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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1956

No. 611

AHTANUM IRRIGATION DISTRICT, a corporation, and THE STATE OF WASHINGTON *et al.*, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS IN COURTS BELOW

The opinion of the Court of Appeals below is reported, *United States of America v. Ahtanum Irrigation District*, 9 Cir. 236 F. 2d 321. It is also printed as Appendix A to this petition. The reported opinion of the District Court below, Honorable James

Alger Fee, now Judge of the Court of Appeals for the Ninth Circuit, appears as Appendix B to this petition. *United States of America v. Ahtanum Irrigation District*, 124 F. Supp. 818 (App. B). All appendices have been printed separately and accompany this petition.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals sought to be reviewed, was dated July 10, 1956, and filed and entered on July 10, 1956 (R 591, App. A-1). On October 5, 1956, Associate Justice Wm. O. Douglas of this court signed an order in this cause providing that "the time for filing petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including December 7th, 1956."

Section 1254(1) of Title 28, United States Code, Act of June 25, 1948, c. 646, 62 Stat. 928, is believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

The petitioners present the following questions for review:

I

Is it a violation of the Fifth Amendment to the Constitution of the United States to require a readjudication of water from a stream bordering an Indian reservation, where such waters have been

divided by agreement between the Indians and the nonreservation landowners, whose latter rights have been confirmed by a decree of state court, and become vested property rights under state law?

II

Can there be a readjudication in the Federal District Court of water rights of the landowners on the north side of Ahtanum Creek, which rights were established by the agreement of 1908 and adjudicated by the state courts of Washington in 1925?

III

Can the extent of the rights of landowners to share in irrigation waters in a stream be limited and curtailed by an extension of the rule of implied reservation as expressed in *Winters v. U. S.*, 207 U. S. 564 with no limit on the time of determination of the reasonable needs of the Indians when such waters have previously been divided by contract and the landowners' share adjudicated by the courts of the State of Washington?

IV

Does the Federal District Court have jurisdiction over the use of water from wells which have been drilled entirely outside of the Indian reservation, where such wells were constructed under permits issued by the State of Washington and their operation regulated by the laws of the State of Washington?

V

Does the statute of limitations or laches bar the claims of the Indians or the white landowners south of Ahtanum Creek who are successors to the original Indian patentees?

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES OR REGULATIONS INVOLVED

The Treaty of June 9, 1855, between the United States of America and the Yakima tribe of Indians is involved in the case. (12 Stat. 951, 11 Kapler 698. R 16.) The Treaty is also printed as Appendix C to this petition.

The agreement of May 9, 1908, entered into between the United States of America, acting by and through Chief Engineer Code of the Indian Irrigation Service, and the Secretary of the Interior, with the Ahtanum water users on the north side, acting through a duly designated committee with powers of attorney from the individual water users, is before the court for interpretation. This agreement divided the waters of Ahtanum Creek in accordance with the irrigated acreage on each side, the apportionment being 75 per cent to the north side water users and 25 per cent to the narrow strip of Indian Reservation land lying south of the Creek. The agreement (R 26) appears as Appendix D to this petition.

The Fifth Amendment to the Constitution of the United States of America:

> "RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS. No person shall be held to answer for a

capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Tenth Amendment to the Constitution of the United States of America:

"POWERS RESERVED TO STATES OR PEOPLE. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Article XXI, Section 1 of the Constitution of the State of Washington:

"PUBLIC USE OF WATER. The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use."

Also presented for the Supreme Court's consideration are two statutes of the State of Washington dealing with water rights, namely, RCW 90.04.020, which provides:

"APPROPRIATION OF WATER RIGHTS. The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this title provided. Subject to existing rights, all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be acquired only by appropriation for a bene-

ficial use and as provided in this title. As between appropriations, the first in time shall be the first in right. Nothing in this title shall lessen, enlarge, or modify the rights of a riparian owner existing as of June 6, 1917, or any right however acquired existing as of that date, except that they shall be subject to condemnation for public use, and the amount and priority thereof may be determined as hereinafter provided."

and RCW 90.28.090, which provides:

"RIGHT TO WATER ATTACHES TO LAND—TRANSFER OR CHANGE IN POINT OF DIVERSION. The right to the use of water which has been applied to a beneficial use shall be appurtenant to the land or place upon which it is used: *Provided*, That the right may be transferred to another and become appurtenant to any other land or place of use without loss of priority of right if the change can be made without injury to existing rights. The point of diversion of water for beneficial use may be changed, if the change can be made without injury to existing rights. Before a transfer of the right to use water or change of purpose of use can be made, a person having an interest in the transfer or change shall file a written application therefor with the supervisor, and the application shall not be granted until notice thereof is published as provided for applications for permits to appropriate water. If it appears that the transfer or change may be made without injury to existing rights, the supervisor shall issue to the applicant a certificate in duplicate granting the transfer or change of point of diversion or of use. The certificate shall be filed and be made a record in the office of the supervisor and the duplicate certificate may be filed with the county auditor in like manner and with the same effect as pro-

vided in the original certificate or permit to divert water."

STATEMENT OF THE CASE

Ahtanum Creek rises on the eastern slope of the Cascade Mountains and flows easterly, emptying into the Yakima River about four miles south of the City of Yakima, Washington. (R 124.) By treaty with the Yakima Indians in 1855, Ahtanum Creek was established as the north boundary of the Yakima Indian Reservation. (R 16, App. C.)

The waters of Ahtanum Creek have been used for irrigation by the reservation lands on the south and the nonreservation lands on the north of the Creek. There are not sufficient waters in Ahtanum Creek to irrigate lands on both sides of said Creek now being partially irrigated from that source. (R 129.)

Negotiations over division of these waters resulted in a contract in 1908 between the United States of America, representing the Indians, and the nonreservation landowners. (R 26, App. D.) That contract divided the waters of Ahtanum Creek so that the south side users received 25 per cent of the natural flow of the Creek and the north side users received 75 per cent of the natural flow of the stream, each party surrendering to the other all rights theretofore claimed in the waters in excess of that amount.

In 1925, with the knowledge of the Office of Indian Affairs (R 119, 120, Ex. 13A, 13J) the State of Washington instituted a proceeding to adjudicate

the respective rights of the north side landowners to the use of 75 per cent of the flow of Ahtanum Creek. (R 128, Ex. 14, 139, *In re Ahtanum Creek*, 139 Wash. 84; 245 Pac. 758, 1926.) The decree determined such rights and under it certificates of title to the water rights were issued. (R 519, Ex. 144.)

The judgment fixed the classes of the north side users entitled to share in the waters, the earliest and best rights being assigned the lower numbers. (Ex. 139.) As the flow of the Creek diminishes the less favorable (higher numbered) rights are shut off and must go without water from the Creek the balance of the season. (R 500.)

The Yakima River forms part of the boundary of the Yakima Indian Reservation. Substantial quantities of water from that river are diverted to the use of reservation lands outside the Ahtanum Valley. (38 Stat. 604.)

There are other sources of irrigation water presently undeveloped, entirely on the reservation ample to furnish all of the irrigation water needed for the farm lands on Ahtanum Creek in the Yakima Indian Reservation. (R 129, 449, 452.)

This action was commenced July 2, 1947, and the United States of America seeks the entire flow of Ahtanum Creek in disregard of the contract of 1908. The case proceeded to trial and resulted in judgment in favor of the petitioners and landowners. (Opinion of Hon. James Alger Fee, *U. S. v. Ahtanum Irrigation District*, 124 F. Supp. 818, App. B, R 166.)

Thereafter the United States appealed and the Court of Appeals for the Ninth Circuit reversed the Trial Court. (*U. S. v. Ahtanum Irrigation District*, 236 F. 2d 321. App. A and A-1.)

Petitioners request review of the holdings of the Court of Appeals for the Ninth Circuit limiting the effect of the agreement of 1908 and the state court's proceedings as an interference with the jurisdiction of the State of Washington to administer and determine matters entirely outside of the Yakima Indian Reservation.

ARGUMENT

It is the contention of the petitioners that certiorari should be granted herein for the following reasons:

(a) The Court of Appeals in its decision has decided an important state question involving the water rights of citizens of the State of Washington in direct conflict with the statutes of that state, and in conflict with the tenth amendment to the United States Constitution, reserving unto the states the control over water rights within the state.

(b) The Court of Appeals by its decision has decided an important Federal question which should be settled by the Supreme Court, namely, the effect of a valid limiting agreement upon Indian water rights reserved under an Indian Treaty.

(c) The Court of Appeals has decided a Federal question involving Indian water rights which is an unwarranted extension of *Winters v. United States.* (207 U. S. 564; 52 L. Ed. 340.)

(d) The Court of Appeals by its extension of the doctrine expressed in the *Winters* case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

I

In 1906 the shortage of water in Ahtanum Creek became quite acute, resulting in the commencement of an injunction action by a north side water user against Mr. Redman, the then Indian Service Engineer. (Munn v. Redman, Pl. Ex. 11-1.) This state court action was brought for the purpose of settling the division of the water of Ahtanum Creek, the United States not being susceptible to suit. (Pl. Ex. 8.) In due course negotiations were begun as the north side water users were anxious for a settlement either through the courts or by compromise. The United States was invited to file a Bill in Equity in Federal Court to determine the question. (Pl. Ex. 11-113 "J".) Secretary of Interior Garfield personally examined the situation in the Ahtanum Valley (R 547) and ordered W. H. Code, Chief Engineer of the Indian Irrigation Service, to make a field investigation and report his findings. Exhaustive field

work was done by Mr. Code and included a comprehensive report to Secretary Garfield on October 17, 1907. (Pl. Ex. 11-6.) The Code report found that the irrigated area of Indian land south of the Creek was 1500 acres, and that the nonreservation irrigated acreage north of the Creek was 5500 acres. (Pl. Ex. 11-6.)

After further negotiations in which the United States was represented by A. G. Avery, United States Attorney at Spokane, Washington, powers of attorney were given a committee of water users by the Ahtanum Valley residents and the agreement of May 9, 1908 was signed by Mr. Code and the committee, being approved shortly thereafter by the Secretary of Interior, acting through the First Assistant Secretary.

The agreement was thereafter filed in the office of the auditor of Yakima County, Washington, in volume 72 of Deeds, page 35. (R 128.) The field work and negotiations preceding the agreement obviously involved a painstaking determination of the needs of lands on both sides of the Creek as limited necessarily by the available water.

The Court of Appeals in its decision determined that the 1908 agreement was valid, stating:

> "At the time the 1908 agreement was made, disputes had begun to appear as to the proper division and distribution of the waters of Ahtanum Creek. Of course it was then open to the United States, although not to the white landowners, to start court proceedings designed to adjudicate the rights of the litigants. It is the

> view of this court that it could not have been within the contemplation of Congress that the Secretary, vested as he was with the general power of supervision and management of Indian affairs, and of matters arising out of Indian relations, could not make a peaceful arrangement for a practical mode of use of the waters of this stream." (App. A, Page 32.)

The Court of Appeals also states:

> "But we are constrained to hold that since some arrangement for the apportionment of the Ahtanum waters was the sort of thing which the Secretary was authorized to do by the grant of general powers of supervision and management, he therefore had the power to make the 1908 agreement." (App. A, Page 37.)

The Court of Appeals thus having held the 1908 agreement valid, then directs a complete readjudication of the water rights on the north side, stating:

> "We hold that at any time when the needs of those parties to that agreement, as measured in 1908, were such as to require less than the full 75 percent of the waters of the stream, then their rights to the use of the water was correspondingly reduced, and those of the Indians, in like measure, greater." (App. A, Page 44.)

We thus find the court upholding the agreement on the one hand and then requiring the water users on the north side to completely readjudicate their rights by requiring them to establish their needs as measured fifty years ago. Obviously the difficulty in proving a water right to a particular tract of land fifty years ago, with all of the witnesses dead, or their memories unreliable, presents an insurmountable obstacle in proof, and when it is considered that these

water rights on the north side were adjudicated and determined in a state court proceeding in 1925 (*In Re Ahtanum Creek*, 139 Wash. 84; 245 Pac. 758) we have a taking of private property without due process of law and without just compensation, in violation of the fifth amendment.* The 1908 agreement has been a part of every water right in the Ahtanum Valley and as such has been relied upon by many innocent purchasers over the years. Likewise the adjudication in 1925, which actually was instituted at the request of the Commissioner of Indian Affairs (Pl. Ex. 13 "J" "A"), establishing the various water rights under the 1908 agreement, became a part of the title to all the Ahtanum tracts.

The Court of Appeal's decision states:

> "Furthermore, as in the case of other suits to quiet title, the defendants should have been required to appear by answer and set forth their claims or right to the use of the waters of the stream." (App. A, Page 40.)

The effect is to require the Ahtanum water users to adjudicate again their rights to the use of waters from the stream. They are not only required to establish their needs as of 1908, which was one of the purposes of the 1908 agreement, but are again required to prove their water rights with the same particularity which was required of them in the state

* "That water rights for use upon land are considered appurtenant to the land and therefore realty, is declared by our statutes and prior decisions of this Court."

Madison v. McNeal, 171 Wash. 669, 675, 19 P. 2d 97; RCW 90.28.090 (*Supra*, Page 10.)

"Valid contracts are property whether the obligor is a private individual, a municipality, state or the United States."

Lynch v. U. S., 292 U. S. 571, 579; 71 L. Ed. 1434.

court proceeding in 1925. No applicable authority was cited by the Court of Appeals in support of this unusual procedure, as indeed there is none.

It was admitted that "there are not sufficient waters in Ahtanum Creek to irrigate lands on both sides of said Creek now being partially irrigated from that source." (R 129.)

Any readjudication of water rights vested under state law would result in further reducing the already inadequate water supply and result in confiscation of property in violation of the Fifth Amendment.

II

The Court of Appeals' decision would require the individual defendants to appear by answer and set forth their claims of title to the waters of the stream. It is the contention of the petitioners that this direction of the Court of Appeals violates the Tenth Amendment to the United States Constitution, which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states are reserved to the states respectively or to the people."

When the State of Washington was admitted to the union upon an equal footing with the thirteen original states there was ceded to it jurisdiction to adjudicate the rights of all persons owning property, including water rights, within the boundaries of the state. (*Pollard v. Hagan*, 3 How. 212; 44 U. S. 212; 11 L. Ed. 565.)

The State of Washington by its Water Code (RCW 90.04.020, *supra*, Page 9) has provided for the regulation and control of waters within the state and has provided for the transfer and change of place of diversion of water. (RCW 90.28.090, *supra*, Page 10.)

Likewise, Article XXI, Section 1, of the Constitution of the State of Washington, providing:

> "PUBLIC USE OF WATER. The use of the waters of the State for irrigation, mining, and manufacturing purposes, shall be deemed a public use."

was an assumption by the state of control of irrigation waters within the state reserved to it by the Tenth Amendment above referred to.

The United States requested the State of Washington to proceed with the adjudication of the water rights on the north side of the stream (Pl. Ex. 13-J, A). Cooperation in the proposed adjudication was assured as long as the water rights of the Indians to 25 per cent of the flow of the stream was not infringed. (Pl. Ex. 13-A, R. 119, 120.)

The determination of priority of use among the north side water users was necessary for enforcement of the agreement of 1908. The United States, as mentioned, *supra*, had an opportunity to appear in the adjudication but decided against such appearance. (R 128.)

The State of Washington in good faith proceeded with an exhaustive determination of water rights based on the 1908 agreement. (Def. Ex.

139.) The testimony and proceeding involved all of the land on the north side of the stream. It was a proceeding in rem under the state law. (RCW 90-.04.020 *supra*, Page 9.) Under the decree certificates of title to the water rights were issued. (R 519, Ex. 144.)

It thus appears that to require the water users on the north side of the stream again individually to appear and assert their claims in Federal Court would be a direct encroachment of the rights reserved to the State of Washington under the Tenth Amendment to the United States Constitution and accepted by the state.

III

Petitioners further request review of that portion of the opinion dealing with the rule of implied reservation as expressed in the *Winters* case. *Winters v. U. S.*, 207 U. S. 564 (1908). In no other case of this kind, to the knowledge of petitioners, has an agreement like the 1908 agreement been involved. That contract sought to make equitable distribution between the north side and south side water users. It was executed after the *Winters* case was decided.

The rule is that there is an implied reservation of the irrigation waters of a border stream to the extent of the reasonable needs of the Indians on the reservation. The extent of that need and the time at which it is to be determined have been subjects of inquiry in two cases with which we believe the decision of the Court of Appeals in the *Ahtanum* case

is in conflict because of the 1908 agreement. *Conrad Investment Co. v. United States*, 161 Fed. 829 (C. A. 9, 1908), and *United States v. Walker River Irrigation District*, 104 F. (2d) 334 (C. A. 9, 1939).

The *Conrad* case in broad language states the reservation to be for present needs as well as for future requirements. There was no limiting agreement as there is in this case.

The *Walker River* case provides that the measure of the reasonable needs of the Indians will be determined by experience. After considering all elements, including the actual number of Indians living on the reservation and actually farming, the court rejected the requested claim as excessive, with the comment,

> "That a decree of this sort would tend greatly to depreciate the value of the water rights of the upstream owners, and to make impossible any intelligent program of farming, is obvious." (340.)

In this case irrigation had existed from 1847 to 1908 or 61 years, at the time of the agreement. Petitioners respectfully urge that the contract did make provision for the reasonable needs of the Indians. To hold that they would be entitled now to go beyond the allowance of 25 per cent of the flow of the stream would be to rewrite the contract. Further, it would invite a readjudication of all of the rights of the respective parties whenever it was conceived that a change would benefit the Indians.

The question of reasonable needs has many facets. Ahtanum Valley is a small part of the Yakima Indian Reservation. The waters there are only a fraction of the flow of the Yakima River. Yet the reservation gets 720 cfs. directly from the Yakima River, given in 1914 to satisfy the requirements of the Indians. (38 Stat. 604.) The Ahtanum is a tributary of the Yakima River.

There are undeveloped sources of water on the reservation ample to supply the Ahtanum Valley. This fact should bear on the question of the satisfaction of the reasonable needs of the Indians.

Petitioners primarily request this court to inquire into the extension of the *Winters* case rule in this case wherein the court states:

> "We hold that at any time when the needs of those parties to that agreement, as measured in 1908, were such as to require less than the full 75 percent of the waters of the stream, then their rights to the use of the water was correspondingly reduced and those of the Indians, in like measure, greater." (App. A, Page 44.)

The rights of the north side users to share in 75 per cent of the flow of the stream have been adjudicated in state court. The Court of Appeals holds that their rights must be submitted anew for complete examination. The final determination in the *Walker River* case states that a greater allowance would "* * * make impossible any intelligent program of farming * * *."

Similarly, any interference with the flow of the waters to the north side farms, except as determined

by the state decree, would render impossible any intelligent program of farming. No one would be sure of his water supply. If the rights of any user are to be diminished, such water should go under the state decree to other users in the same class.

Ahtanum farmers have a contract that is part of their chain of water right titles. They have a state adjudication of their share of the 75 per cent of the flow of the Creek. Any interference would be confiscation of their established values.

The north side landowners have water delivered on the basis of seniority. When the water is low, then the oldest rights only receive water. If the opinion is applied literally that implied reservation will be extended to nullify the rights of other senior users. For under the agreement (App. A) and the adjudication in 1925 (Ex. 14, 139), all of the 75 per cent of the flow went to the north side landowners. It thereupon became subject to state adjudication and each owner of land granted a senior right was adjudged to be entitled to his share of the water until the supply diminished below an amount sufficient to supply all rights senior to his. The decision sought to be reviewed would not only rewrite the 1908 agreement, it would nullify the state adjudication. *In re Ahtanum Creek*, 139 Wash. 84; 245 Pac. 758.)

IV

The state of Washington has provided by statute for the regulation of public ground waters. (RCW 90.04.010 *et seq.*) Provision is made to determine

the priority between surface and ground waters. Permits for the withdrawal of ground waters are required and safeguards are set up as to the withdrawal of quantities, location of withdrawal and uses to be made of the waters. There is a prohibition upon the waste and unauthorized use of such waters.

Our investigation has disclosed no such public ground water Code under the Federal statutes. Under the decision of the Court of Appeals it would appear that the District Court is directed to make inquiry concerning the effect of the sinking of numerous wells causing an additional draft upon the available physical water supply within the water shed. This we urge as a matter particularly within the jurisdiction of the State of Washington. The wells are all outside of the boundaries of the Indian reservation. There is no direct connection between the wells and the Ahtanum Creek. Any diminution of the surface water supply by virtue of the operation of the wells is within the purview of the state administration under the Ground Water Code. We respectfully urge review of the direction of the Court of Appeals pertaining to this strictly local state matter.

V

The Court of Appeals has rejected the argument of these petitioners on the question of laches and estoppel. We respectfully urge that the rights of the so-called Class 3 defendants are governed by the rules of estoppel and laches. (R 372, 373.) The

Class 3 defendants are those White landowners who have succeeded to the interests of the Indians in the properties south of Ahtanum Creek.

We view the Class 3 defendants as being entirely relieved of any incapacity. Any one of them could have instituted a class action, if such were deemed advisable, against the north side landowners to establish an interest in the 75 per cent of the flow of Ahtanum Creek. No such action has been commenced. Laches and estoppel therefore should bar any recovery on the part of the Class 3 defendants. In fact counsel for the United States stated that he did not represent them. Their rights and liabilities are in the same class as any other citizens.

CONCLUSION

For the reasons hereinabove stated, and because the determination of the questions raises an important issue of Federal-State relations, we respectfully request that this court by Writ of Certiorari should review the Court of Appeals decision in *United States of America, Appellant, v. Ahtanum Irrigation District, Appellee,* No. 14,714, in the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX "A"

236 F. (2d) 321

In the

United States

Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

AHTANUM IRRIGATION DISTRICT, et al.,
Appellees.

No. 14,714
July 10, 1956

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Before
POPE, LEMMON and CHAMBERS, Circuit Judges
POPE, Circuit Judge

This is a suit brought by the United States as trustee for the Yakima tribe of Indians to establish and quiet title to the Indians' right to the use of the waters of Ahtanum creek in the State of Washington, which right is alleged to have been reserved by the treaty of June 9, 1855 between the United States and the Confederated Tribes of Yakima Indians.① This

① The treaty appears at 12 Stat. 951. It was ratified by the Senate March 8, 1859.

was the treaty by which the Yakima Indian reservation was set aside for the Indians. The defendants in the main are the non-Indian owners of lands outside the reservation who had appropriated or claimed rights to the use of the waters of the stream which formed the northern boundary of the reservation.②

Holding that the United States had not proved that it, as trustee or otherwise, had any right, title or interest in any water of Ahtanum Creek,③ the trial court dismissed the action and the complaint on the merits.

The complaint sets out the treaty whereby a certain tract of land in the then Territory of Washington was set aside and reserved for the use of the Yakima tribe as a home and abiding place of the Indians. It alleged that in view of the purposes of the treaty, its intention to encourage the Indians to give up their nomadic habits and to till the soil, and also in view of the arid character of the lands within the reservation which required irrigation for successful cultivation, the treaty operated to reserve suf-

② Also named are certain so-called "Class Three Defendants" who are individual owners of irrigable land within the Indian reservation boundaries and who are the successors in interest to the Indian allottees whose allotments were patented in fee simple and subsequently sold to these defendants.

③ Conclusion of Law (1). "That plaintiff has not proved that the United States, as trustee or otherwise, has any right, title or interest in any water of Ahtanum Creek as appurtenant to the Reservation as a whole or appurtenant to any parcel or collection of parcels located thereon by virtue of any reservation, express or implied, in the Treaty of 1855 or otherwise or at all."

Conclusions of Law (4). "That plaintiffs have not proved that the Yakima Indian Nation, the Confederated Tribes of Yakima Indians, any Indian ward or allottee, or any person owning or occupying land on the Yakima Indian Reservation has any right, title or interest in any water right in Ahtanum Creek by virtue of any reservation in the Treaty of 1855, by reason of the fact that the Reservation borders on Ahtanum Creek, or because of any appropriation and beneficial application of any waters of Ahtanum Creek."

ficient waters of Ahtanum Creek for the Indians' needs, both present and future. The complaint further alleged that on May 9, 1908, "in direct violation of the rights * * * reserved to the Yakima tribe," the then chief engineer of irrigation, Bureau of Indian Affairs, entered into an agreement with certain white water users whose lands were situated outside of the reservation, whereby they were to have and be entitled to 75 percent of the natural flow of Ahtanum Creek and the Yakima Indians were to have the remaining 25 percent of that stream's natural flow. There was added to the prayer for an adjudication of the rights of the parties to the use of the stream waters, a prayer that the court adjudge this agreement of May 9, 1908 to be invalid and of "no force and effect."

The court held: 1, that there was no reservation of any water rights by the Treaty of 1855;[4] 2, that in any event the agreement of 1908 gave the white owners nothing that they did not already own;[5] and 3, that an adjudication in the courts of the State of Washington in 1925 determining the rights of the white landowners outside of the Indian reservation to the 75 percent of the natural flow of the stream,

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[4] Finding of fact No. 5: "That there was no reservation of any water rights to Ahtanum Creek by the Treaty of 1855, either express or implied, to the United States or to the Confederated Tribes, or to individual Indians, adverse to defendants. That defendants owning lands north of the Ahtanum have not infringed upon any water rights of the United States, the Confederated Tribes, or individual Indians under the proof herein."

[5] "We are of the opinion that [the Secretary] did nothing but recognize the limitations set by practice upon the usage of water on the reservation and confirm the grants to the owners outside." 124 F. Supp. 818, at 835.

had been "encouraged" by the United States, and thus the United States was thereby barred from claiming any part of this 75 percent.[6] Accordingly, the court concluded that the cause should be dismissed.

In view of the action taken in the court below, it is apparent that we must consider the following questions, all of which are raised by the Government's specification of errors.

First, were any rights to the use of any of the waters of Ahtanum Creek reserved by the Treaty of 1855? If there were none, then the question of the validity of the agreement of 1908 need not be discussed.

Second, if it be concluded that by the treaty of 1855, rights to the use of the waters of Ahtanum Creek were reserved for the benefit of the Indians, were the rights thus reserved any greater than the 25 percent of the natural flow of the stream? If the rights of the Indians, as reserved, did not exceed the 25 percent allocated to them in 1908, it would appear that no serious question can be raised as to the validity of that agreement.

Third, if the rights reserved for the Indians by the treaty were of the extent and size claimed by the United States, that is to say, rights to sufficient wa-

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[6] Conclusion of Law (7). "That in 1926 the State of Washington, which then had jurisdiction over the waters of Ahtanum Creek, adjudicated all claims to 75% of the flow of Ahtanum Creek, which proceeding binds the United States and bars any claim to that portion of the flow."

ters for the needs of the Indians as they might exist in the future, then we must of necessity consider the validity and force of the 1908 agreement, for it is conceded that the present needs of the Indians are sufficient to require substantially the whole flow of the stream. If the agreement purported to deprive the Indians of rights which actually belonged to them, then that circumstance must be considered in determining whether the Government officials in executing it exceeded their power and authority.

That the Treaty of 1855 reserved rights in and to the waters of this stream for the Indians, is plain from the decision in Winters v. United States, 207 U. S. 564. Apart from the date of the treaty discussed in that case, the facts there are practically identical with those which attended the treaty of 1855 with the Yakima tribes. In the Winters case, as here, the reservation was created by treaty; the reserved lands were a part of a much larger tract which the Indians had the right to occupy; and the lands were arid and without irrigation practically valueless. In the Winters case the Milk River was designated as the northern boundary of the reservation. This court, in its decision (143 F. 740, 746), which the Supreme Court was affirming, had said: "We are of opinion that it was the intention of the treaty to reserve sufficient waters of Milk River, as was said by the court below, 'to insure to the Indians the means wherewith to irrigate their farms', and that it was so understood by the respective parties to the treaty at the time it was signed." The attempted

efforts to distinguish the Winters case from this one, are without force.[7]

It is true that the Yakima treaty described the Ahtanum as the north boundary of this reservation, whereas the boundary of Fort Belknap reservation in the Winters case was described as beginning at a point in the middle of the main channel of Milk river. But a tract of land bounded by a nonnavigable stream is deemed to extend to the middle of the stream. Hirt v. Entus, 37 Wash. 2d 418, 428, 224 P. 2d 620.[8] The suggestion that much of the water of the Ahtanum Creek originates off the reservation is likewise of no signficance. The same thing was true of the Milk River in Montana; and it would be a novel rule of water law to limit either the riparian proprietor or the appropriator to waters which originated upon his lands or within the area of appropriation. Most streams in this portion of the country originate in the mountains and far from the lands to which their waters ultimately become appurtenant.

No significance attaches to the early date of this treaty for the record is plain that some irrigation from the Ahtanum had begun in this valley before

[7] The suggestion that the Yakima treaty differs from that of the Fort Belknap Indians because of its earlier date, when irrigation was not so common, is without force. As hereafter noted, Indians were making some use of the Ahtanum waters for irrigation before 1855. Unanswerable is the statement of a witness before the Commission studying the Yakima river rights: "Among other things, for instance, the Indian Department was to maintain an agricultural school to teach these Indians agriculture. What for? Why, they could not raise a bean without irrigation." P. 117, Senate Document 337, referred to infra note 11a.

[8] The course of this boundary is described in the treaty as follows: Commencing on the Yakima River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the Forks; thence along the southern tributary to the Cascade Mountains; * * *"

1855 in which the Indians had participated. It is true that this early use was on the north side of the Creek, but they then had occupancy of both sides, and we cannot assume that when they agreed to move to the south side of the Creek they surrendered all rights to use of the water. As in the Winters case, we must answer in the negative the questions there posed: "Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?" As was said in the Winters case, (207 U. S. 564, 576): "The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people." When the Indians agreed to change their nomadic habits and to become a pastoral and civilized people, using the smaller reservation area, it must be borne in mind, as the Supreme Court said of this very treaty, that "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." United States v. Winans, 198 U. S. 371, 381. Before the treaty the Indians had the right to the use not only of Ahtanum Creek but of all other streams in a vast area. The Indians did not surrender any part of their right to the use of Ahtanum Creek regardless of whether the Creek became the boundary or whether it flowed entirely within the reservation.⑨

⑨ The Winters case settled the proposition that the treaty's failure to use the word "irrigation" was without significance. As an indication as to what streams the treaty recognized as exclusively for the Indians, note the following treaty provision: "The exclusive right of taking fish in all the streams, where *running through or bordering said reservation*, is further secured to said confederated tribes and bands of Indians. * * *" (Emphasis added.)

This brings us to a discussion of the question of quantum of waters reserved. It is obvious that the quantum is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable. This matter was directly passed upon in Conrad Inv. Co. v. United States, 9 Cir., 161 F. 829, decided shortly after the Winters decision. This court was there undertaking to follow and apply that decision. It said (p. 832): "What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters case." The trial court's decree in that case, which this court affirmed, enjoined the interference with a specified quantity of water presently diverted and used for the benefit of the Indians on the reservation. This was 1666⅔ inches, but the decree contained a further provision to the effect that the Indians were to be protected in respect to their future increased needs. This portion of the trial court's decree was expressly approved by this court in the following language, (p. 835): "It is further objected that the decree of the Circuit Court provides that, whenever the needs and requirements of the complainant for the use of the waters of Birch creek

for irrigating and other useful purposes upon the reservation exceed the amount of water reserved by the decree for that purpose, the complainant may apply to the court for a modification of the decree. This is entirely in accord with complainant's rights as adjudged by the decree. Having determined that the Indians on the reservation have a paramount right to the waters of Birch creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification, should the conditions on the reservation at any time require such modification."

At the time of the making of the treaty construed in the Winters case, it is plain there was little or no irrigation then being carried on by the Indians. As the Supreme Court pointed out, until that time they were a nomadic people. As was suggested by this court when that case was here, the Indians "might not have known the exact meaning of the word 'irrigation' had it been used in the treaty." No one even thought in the Winters case that the rights of the Indians to the use of the water reserved should be limited to the quantities used at the date of the treaty. The implied reservation looked to the needs of the Indians in the future when they would change their nomadic habits and become accustomed to tilling the soil.

It is plain from our decision in the Conrad Inv. Co. case, supra, that the paramount right of the Indians to the waters of Ahtanum creek was not limited

to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation. Some effort is made here to assert that the reservation of waters for the benefit of the Indians must be limited to the amount or quantity actually used beneficially by the Indians within some period of time or within what the court might find to be a reasonable time. Thus, it is argued that since at the time of the 1908 agreement the area of land on the reservation then under irrigation through the Indian ditches did not exceed some 1200 acres, that the rights of the Indians were limited by those needs.

This argument, as we shall later note, is used as the basis for a contention that the 1908 agreement adequately provided for all rights of the Indians, since their rights were limited to the use of this 1200 acres. Nothing in the Winters case or in any other decided case lends any support to such an argument. As indicated, exactly the contrary was held in the Conrad Inv. Co. case, supra. Between 1908 and 1915 the Indian Irrigation Service was engaged in the work of constructing and extending irrigation canals and ditches with headworks and means of diversion so that by 1915 the Indian lands upon the reservation susceptible of irrigation from Ahtanum Creek amounted to approximately 5000 acres. Had there been no 1908 agreement, it seems plain that as of 1915 it would have to be said that the rights reserved in the treaty were rights to the use of water from

this stream sufficient to supply the needs of this 5000 acres.

When the complaint in the Winters case was filed approximately 5000 acres of land were then being irrigated upon the Fort Belknap reservation. The waters were diverted and distributed by means of a canal with a carrying capacity of 5000 inches of water, and such amount of water was required for the then needs and requirements of the Government and the Indians.[10] The record here shows that an award of sufficient water to irrigate the lands served by the Ahtanum Indian irrigation project system as completed in the year 1915 would take substantially all of the waters of Ahtanum Creek. It does not appear that the waters decreed to the Indians in the Winters case operated to exhaust the entire flow of the Milk River, but, if so, that is merely the consequence of it being a larger stream. As the Winters case, both here and in the Supreme Court, shows, the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers. Our Conrad Inv. Co. case, supra, held that what the non-Indian appropriators may have is only the excess over and above the amounts reserved for the Indians. It is plain that if the amount awarded the United States for the benefit of the Indians in the Winters case equaled the entire flow of the Milk River, the decree would have been no different.

United States v. Walker River Irr. Dist., 104 F. 2d 334, was another case in which this court

[10] See statement of facts, 143 F. 741.

applied the doctrine of the Winters case and recognized the right of the Indians upon the reservation there involved, to the use of water to the extent reasonably necessary to supply their needs. The Walker River Indian reservation was an early one, initiated in 1859. At that time, as this court pointed out, the Indians "unskilled in the art of farming would necessarily make slow progress. * * * The extent to which the use of the stream might be necessary could only be demonstrated by experience." (p. 339) At any rate by 1886 some 1900 acres were under cultivation and at the time of the trial this area had not substantially increased and the number of Indians was not increasing. This court accepted the master's report and his estimate of the needs of the Government "as demonstrated by 70 years' experience," and made the recommended award for water sufficient to irrigate 2100 acres. It is unnecessary to consider whether, had there been no 1908 agreement, the rights of the government as trustee for the Indians would have been constantly growing ones in the years following 1915 had the irrigable area within the reservation continued to increase. It is sufficient for the purposes of this case to say that an adjudication of the rights of the United States in and to the waters of Ahtanum Creek as of 1915, would necessarily award the United States a right measured by the needs of the Indian irrigation project at that date.

The assertion that any reservation of waters for the benefit of the Indians must be limited to the amount or quantity actually used beneficially within

some period which the court might find to be a reasonable time, is accompanied by a suggestion that a reasonable time limitation would terminate in 1908. We find no basis for this. We deal here with the conduct of the Government as trustee for the Indians. It is not for us to say to the legislative branch of the Government that Congress did not move with sufficient speed to appropriate the funds necessary to complete this irrigation system by 1908 rather than by 1915, or that the Government had thus lost or forfeited the rights reserved for the Indians.

We next notice the court's conclusion that a 1925 state court adjudication of the respective rights of the white landowners as between themselves to the 75 percent of the flow of Ahtanum Creek, which had been allotted to them in the 1908 agreement, was a proceeding "which binds the United States and bars any claim to that portion of the flow." This refers to the proceeding reviewed in In Re Water Rights in Ahtanum Creek, 139 Wash. 84, 245 P. 758. There the non-Indian, non-reservation users of waters from Ahtanum Creek procured an adjudication of their relative rights. The United States was not a party to that suit, although as the pretrial order recites, it had knowledge that the adjudication was proceeding and it had an opportunity to appear therein but decided against it. It is too clear to require exposition that the state water right decree could have no effect upon the rights of the United States. Rights reserved by treaties such as this are not subject to appropriation under state law, nor

has the state power to dispose of them. Federal Power Comm'n v. Oregon, 349 U. S. 435, 444.

This brings us to the crucial question in the case, the question of the validity and effect of the 1908 agreement.

On August 18, 1906, one David Munn, as plaintiff, filed in the Superior Court of Yakima County, Washington, a complaint against W. H. Redman and others. The complaint alleged that the plaintiff had rights to the waters of Ahtanum Creek; that the defendants named were wrongfully diverting water from the Creek, and prayed for an injunction against them. Redman was an employee of the United States and was an Indian Irrigation Service engineer. The Indian Service was then in the process of enlarging the irrigation ditches on the reservation. Redman was sued as an individual. With the approval of the Attorney General, the United States Attorney at Spokane, Washington, entered an appearance for Redman, not as attorney for the Government, but as attorney for Redman. The filing of this suit led to a considerable volume of correspondence between the United States Attorney and the Attorney General and between the Secretary of the Interior and the officials of the Indian Irrigation Service. Counsel for the plaintiff offered to dismiss the case if the United States would file a bill in equity to settle questions relating to rights to the waters of Ahtanum Creek. Such a bill in equity was prepared by the United States Attorney and approved by the Attorney Gen-

eral. For some reason not apparent from the record, it was not filed,[11] and in the latter part of October, 1907, the Superintendent of the Indian Agency was directed by the Commissioner of Indian Affairs to begin conferences with counsel who had filed the Munn suit to see if an adjustment of the rights to use of the water could be made out of court.

In the spring of 1908 Chief Engineer Code of the Indian Irrigation Service was directed to go to the reservation to confer with a committee of white water users for the purpose of bringing about a settlement of the rights to the use of the Ahtanum water. The upshot of this was the execution of the agreement dated May 9, 1908 between the United States, acting through Code and a large number of named white users of water from Ahtanum Creek on lands located outside the reservation. The gist of the agreement was in its article I reading as follows: "The party of the first part agrees to limit and define its claim to the waters of Ahtanum Creek and its tributaries as twenty-five percent (25%) of the natural flow of said Creek, and the party of the second part agrees to limit and define its total and aggregate claim to said waters as seventy-five per cent (75%) of the said natural flow of said stream, each party hereto surrendering and conceding to the other party all rights heretofore claimed in the said waters in excess of the amounts herein named." The

[11] On August 8, 1907, the Secretary of the Interior requested a copy of the bill. This was furnished by the Attorney General on August 10. Two days later, on August 12, the Attorney General wired the United States Attorney in Spokane telling him not to file the bill until further notice.

remainder of the agreement dealt with methods of measuring the water in the creek, the manner of diversion, the installation of headgates and the designation of a ditch master. It was signed by Code on behalf of the United States and by the attorneys in fact for the white landowners, and on June 30, 1908 it was approved by Frank Pierce, First Assistant Secretary of the Interior.[11a]

While the execution of the agreement led to the dismissal of the Munn case and dispensed with efforts for the time being to prepare and file a suit on behalf of the United States to settle the water rights, the execution of the agreement did not serve to lay the whole matter at rest, for as we shall hereafter note, arguments with respect to the agreement and its validity, and with respect to whether the parties

[11a] The record contains copies of the official correspondence within the Interior Department and between that Department and the Department of Justice relating to the negotiations which led to the execution of this agreement. In the fall of 1907 Mr. Code transmitted to the Secretary a report of his investigation on the reservation and of his views concerning a possible compromise of claims respecting waters of Ahtanum Creek. His recommendation was a compromise agreement involving a division of the waters based upon the relative areas then actually irrigated by the Indians on the south side and the white settlers on the north. He estimated that at that time 1500 acres were irrigated on the Indian side and 5500 acres on the white side, and he recommended an attempt to adjust on the basis of one-third of the waters to the Indians and two-thirds to the white settlers. He referred to the "recent Montana decisions" and commented upon the possibility they would be sustained by the Supreme Court, but stated, "to a layman, it seems that, as between the early white settlers, who have made prior and beneficial use of the waters of a boundary stream, and the Government, which as guardian of the Indians' water rights, had not done so, the latter would be the party to make restitution to the Indians."

It does not appear that the Code agreement was submitted to any law officers of the Government for an opinion with respect to its validity prior to its execution and approval. In contrast with his layman's opinion as to the law, the attorney who represented the white landowners in dealing with Code, later testified: "I advised my clients that the Indian land was entitled to sufficient water to irrigate it. We tried to make the best bargain we could with the Secretary of the Interior, and we did." Senate Document 337, 63d Cong., 2nd Sess., Dec. 20, 1913, p. 117.

thereto were or were not complying therewith, continued to rage for the next 30 years.[12]

[12] In the year 1912 individual Yakima Indians began writing to the Attorney General urging the institution of a suit to determine the rights of the Indians both in the Yakima River and in Ahtanum Creek. They asserted that the agreement mentioned limiting the Indians to one-fourth of the Ahtanum Creek and the other agreement limiting the Indians to 147 cubic feet of water from the Yakima River amounted to robbery of the Indians and was "damn shame defendants stealing from poor Indians." The matter was referred by the Attorney General to the Secretary of the Interior who recommended that court proceedings should not be instituted because there was pending in Congress a bill which, if passed, "will restore to the Yakima Indians the waters rights to which they are entitled under the Treaty of 1859." (Attached was correspondence relating to a prior Secretary's limitation of the Indian rights in the Yakima River which the Secretary states was "less than the Indians are fairly entitled to and reasonably need.")

That material, and the proposed bill did not refer to the Ahtanum waters. A Department of Justice memorandum signed "C.S.E." recites, "I have gone into this matter with considerable care and am impressed with the legal soundness of the argument presented by the Yakima Indians, but the Interior Department is responsible for whatever action detrimental to their rights has been taken * * *" The Indians were advised that no proceedings would be instituted at that time.

On November 2, 1918, the Superintendent on the Yakima reservation advised the Commissioner of Indian Affairs that white users along the Ahtanum were not living up to their side of the agreement of 1908; that control works and measuring devices as required by that agreement had not been provided by the whites, and the superintendent understood that he was not obliged to live up to the agreement either since the white users had failed to comply. .

In 1923, the Chief Engineer in charge of Indian Irrigation recommended to the Commissioner consideration of an action to adjudicate the rights in Ahtanum Creek. Further petitions requesting an adjudication were received from the Indians and on July 5, 1927, the then Commissioner of Indian Affairs wrote to the Superintendent of the reservation referring to the decision of the court in the Winters case and to the Code agreement of 1908, and stated: "However, the provisions in that agreement were never observed or carried out and since that agreement was in its inception nothing more than a tentative understanding for use until such time as the disputed water rights might be determined by the court, and in view of the failure of the parties to observe its provisions, this office regards said agreement as of no effect whatever in the matter of determining the water rights to which the Indians are entitled." The superintendent was directed to see that the Indians received the quantity of water which they needed. This order was suspended at the request of Senator Jones of Washington, but there ensued and continued for several years thereafter extensive correspondence between the Ahtanum Irrigation District and the state Supervisor of Hydraulics of Olympia, Washington, on the one hand, and the Department of the Interior and Commissioner of Indian Affairs, on the other, respecting alleged excess diversions of the waters of Ahtanum Creek, and suggesting that the Secretary of the Interior undertake to investigate with a view to a settlement of the continuing pending dispute.

This brings us to the heart of this case and the primary question involved, namely, the problem of the validity of the 1908 agreement. This is a most

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The correspondence shows that the white users constructed a dam across Ahtanum Creek; that this was torn out by the Indian Bureau and Indian police stationed to prevent its replacement. This matter was called to the attention of the Attorney General by First Assistant Secretary of the Interior Dixon by letter dated January 25, 1930. The Attorney General was advised that there was need for immediate action, and an investigation was asked. The Attorney General had an investigation made by the Federal Bureau of Investigation and on December 30, 1930, he transmitted the report of the investigation to the Secretary of the Interior. Attached to the report was a copy of a letter from the Solicitor for the Interior Department dated June 7, 1929, addressed to the Secretary, and expressing the view that the Code agreement of 1908 was valid and within the authority of the Secretary of the Interior to execute. The letter of transmittal, signed by Attorney General William D. Mitchell, stated: "I am not aware of any authority authorizing the Secretary of the Interior or any officials of the Government under him to enter into a compromise settlement of controversies such as are here mentioned, whether the same be effected as a compromise of a suit or otherwise."

On May 12, 1931, First Assistant Secretary Dixon wrote to the Attorney General that none of the parties would be satisfied until a court decision in the matter in dispute had been rendered, and requested the Attorney General to institute a suit to quiet title to the waters of Ahtanum Creek. The Attorney General directed the United State Attorney at Spokane to prepare a bill of complaint for that purpose. There followed telegrams from Senator Jones to the President stating that it was imperative that orders be issued stopping any judicial proceeding and transmitting a copy of a telegram from the Secretary of the Ahtanum Irrigation District advising that matters had been adjusted for the current season. The Secretary of the Interior, being advised that a working agreement had been reached respecting the water for the season of 1932, recommended that the institution of the suit to adjudicate the rights be delayed.

On October 2, 1933, Secretary of the Interior Ickes requested the Attorney General to proceed with the suit to settle the conflict over the Ahtanum Creek water rights. Washington Senator Dill wired the Commissioner of Indian Affairs suggesting that the proposed suit be called off, and transmitted a copy of the letter to him from the Secretary of the Ahtanum Irrigation District urging such non-action.

In June, 1938, United States Attorney Driver requested authority to institute a suit to adjudicate the rights to the use of water of Ahtanum Creek. This was followed by his submission of a proposed bill of complaint for this purpose. There followed letters from the Secretary of the Ahtanum Irrigation District to Senators Schwellenbach and Bone urging them to take steps to prevent the institution of this suit. This letter was transmitted by the Senators to the Attorney General.

By Senate Resolution dated July 18, 1939, the Attorney General was requested to stay these proceedings until the Secretary of the Interior could report on the feasibility of supplementing the supply of water in Ahtanum Valley. The Secretary of the Interior reported on July 21, 1942, pursuant to the Senate Resolution, that the proposed project to procure additional water was not feasible.

difficult question. The code agreement is one practically without precedent.[13] No statute, executive order or departmental regulation made any provision for that sort of thing. There is no long continued practice in the executive department of the Government from which congressional acquiescence could be spelled out.[14] Nothing can be found in the way of an established usage, "which constituted the common law of the department and fixed the duties of those engaged in its activities." United States v. Birdsall, 233 U. S. 223, 231. The agreement was approved by the First Assistant Secretary of the Interior. Nothing turns upon the fact that the approval was executed by an Assistant Secretary rather than by the Secretary himself. Under like circumstances it has been held that the act of an Assistant Secretary must be presumed to be within the scope of the authority which the Secretary conferred upon his Assistant. Parish v. United States, 100 U. S. 500, 504; United States v. Peralta, 19 How. 343, 347; Norris v. United States, 257 U. S. 77, 81, 82.[15] In inquiring whether the Secretary of the Interior himself had power or authority to enter into such an agreement, it is noted that at that time, the powers granted to the Secretary of the Interior, so far as Indians and Indian rights

[13] The only prior instance of such an agreement on the part of the Secretary was that made by Secretary Hitchcock in 1905, agreeing to limit these Indians' rights to Yakima River water. It is referred to infra.

[14] United States v. Midwest Oil Co., 236 U. S. 459, 469; cf. Sioux Tribe v. U. S., 316 U. S. 317 at p. 326.

[15] Provision for an Assistant Secretary of the Interior and of his performance of duties prescribed by the Secretary, was made in R. S. §§ 438, 439 (1873). 23 Stat. 497 (1885) provided for a First Assistant Secretary.

were concerned, were stated in very general terms, as follows:

> "Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Third. The Indians." (R.S. 441, see 5 U. S. C. A. 485.)
>
> "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations." (R.S. 463, now 25 U. S. C. A. 2.)[16]

It is suggested that whatever may have been the initial force and effect of the 1908 agreement, that subsequent official acquiesence in the agreement and the performance thereof, and administrative interpretations of the applicable statutes as giving the Secretary power to approve the agreement, operated in some manner to ratify the arrangement. It is contended that the contemporaneous construction of the applicable statutes by those charged with the execution thereof, especially when it has long prevailed, is entitled to great weight.

A thorough search of the reports made to Congress by the committees dealing with appropriation of the funds which were used between the years 1908

[16] Appellees have cited as statutes having a bearing upon the authority of the Secretary to execute this agreement, Title 25 U. S. C. A. §§ 381 and 382. § 381, authorizing the Secretary to prescribe rules and regulations "necessary to secure a just and equal distribution [of water] among the Indians residing upon any such reservations," refers to regulations for distribution among the Indians themselves. See United States v. Powers, 305 U. S. 527. § 382 did not become effective until 1909 and it appears to provide merely for the irrigation of Indian lands in connection with projects undertaken under the Reclamation Act.

and 1915 in completing the irrigation system designed to provide the 5000 acres with waters from Ahtanum Creek, fails to disclose any real evidence that Congress was reliably informed of this limiting agreement of 1908. If anything, the continued appropriations for such a sizeable irrigation system would suggest a lack of information on the part of Congress as to the 1908 agreement. So far as Congress is concerned, there is no evidence whatever that the members thereof had any information from the Department of the Interior with respect to this particular agreement prior to the year 1932 when a bill was introduced for the purpose of approving and ratifying the agreement.[17] This was a bill introduced by Senator Jones of Washington entitled "A Bill Approving and Confirming Contract For Apportionment of Waters of Ahtanum Creek, Washington, Between Yakima Indian Reservation And Lands North Thereof Dated May 9, 1908." Extensive hearings were held but the bill had rough going[18] and was not reported.

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[17] Hearing before the Committee on Indian Affairs, U. S. Sen., 72nd Cong., 1st Sess., on S. 3998, (erroneously called S. 3988). Some of the witnesses at the hearings before the Joint Congressional Commission which investigated Secretary Hitchcock's apportionment of Yakima River waters mentioned the Ahtanum agreement. Neither that investigation nor the report which followed dealt with the Ahtanum agreement. Report of Joint Congressional Commission, Document No. 337, 63d Cong., 2nd Sess.

[18] "Senator Wheeler. Did the Indians agree to such a division at that time? Senator Jones. I do not think they did—that is, individually. I do not think they had a council. They acted through the Secretary of the Interior." Senator Wheeler. "If they did not have a council, Senator, my contention has always been that the Secretary of the Interior and the Indian Bureau had no right to go ahead and act arbitrarily without the tribal council's consent, taking away water or land from these Indians and giving it to white settlers. * * * The agreement, so far as I am concerned, has no force or effect." Hearings, (supra note 17) pp. 18, 20. J. Henry Scattergood, Assistant Commissioner of Indian Affairs, appeared at the request of the committee and expressed his personal view, contrary to that of the Secretary, that the bill should not pass but that suit to determine the rights should be started by the Attorney General, (p. 48).

In 1905 Secretary of the Interior Hitchcock had undertaken to make an agreement limiting the rights of this same tribe of Indians to waters flowing in the Yakima River, and which were used on another portion of the same reservation. The Secretary undertook to limit the Indians' rights to 147 cubic feet per second. In 1913 a joint commission of the Senate and House visited that area and held hearings with respect to that agreement and to consider action designed to correct the wrongs claimed to have been done the Indians by the Secretary's agreement. The commission had before it a proposal to provide by congressional action additional water for irrigating these lands, known as the Wapato project, an area adjoining the Yakima River. The report, (Document 337, footnote 11a, supra) was that the Secretary's allowance of 147 second feet for the use of the reservation lands "was when made and now is inadequate, inequitable, and unfair to said Indian Reservation." The result of that investigation was the passage of the Act of August 1, 1914, 38 Stat. 604, appropriating funds designed to provide in addition to the 147 cubic feet per second mentioned in the Secretary's stipulation, sufficient stored water to make an aggregate of at least 720 cubic feet per second, this to be in satisfaction of the rights of the Indians in the Yakima River. The Act recited that "the Indians * * * have been unjustly deprived of the portion of the natural flow of the Yakima River to which they are equitably entitled * * *" This congressional inquiry and the enactment was not con-

cerned with the 1908 agreement, or with the Ahtanum waters; it dealt solely with the Wapato project and Yakima River waters. The enactment added up to a congressional disapproval of Secretary Hitchcock's action.

With respect to the departmental interpretations of the question of the Secretary's power or authority to approve the 1908 agreement, the material referred to in footnote 12, supra, sufficiently indicates that there was no clear or definite determination by the Interior Department and such expression as the office of the Attorney General gave, questioned the validity of the 1908 agreement.

As early as 1885, the Attorney General advised the Secretary that the latter had no power to approve leases of Indian lands for grazing purposes. The opinion was based in part upon the provisions of what is now Title 25, § 177, prohibiting "purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians." (18 Ops. A.G. 235, 238.) While under date of June 7, 1929, Interior Solicitor Finney had advised the Secretary that "You would not now be justified in ignoring or attempting to repudiate the agreement entered into in 1908," yet as noted in footnote 12, supra, Attorney General Mitchell stated that he was not aware of any authority authorizing the Secretary of the Interior to enter into the arrangement mentioned. In addition to the 1927 direction of the Commissioner of Indian Affairs to the

Superintendent of the reservation to disregard the 1908 agreement as being of no effect whatever, Commissioner Rhodes on March 22, 1932, recommended an unfavorable report on the House counterpart of the Senate bill proposing to ratify and approve the 1908 agreement. He also stated the view of the Indian Service that the agreement was merely a temporary working understanding and not intended to be binding for the future as conditions changed. He referred to the pending drafting of a bill of complaint to adjudicate the questions involved, and thought that until the adjudication was complete there should be no effort to have Congress confirm the 1908 agreement.[19] While the then Secretary of the Interior thus ignored the Commissioner's recommendation, the succeeding Secretary of the Interior, on October 2, 1933, requested the Attorney General to proceed with the suit. (See note 12, supra.)

The record completely fails to support the contention of the appellees that there was any definite administrative interpretation of the Acts relating to the powers of the Secretary to the effect that under them such an agreement was a valid one. Rather it would appear the question was one under constant debate and dispute within the Department itself.

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[19] Notwithstanding this recommendation from the Commissioner, Secretary Wilbur on the same date stated to the House Committee, "Unless I am prevented by court action, I propose to adhere to the agreement of 1908." He stated he had no objection to the proposed legislation. His lengthy letter takes notice of a question relating to the validity of the 1908 agreement but in listing questions in dispute, notes only questions that "relate to the interpretation of the agreement rather than to its validity."

Of course, if the Secretary lacked the power to approve the 1908 agreement in the first place, neither he nor any of his subordinates could by subsequent conduct or approval, or by any action or failure to act, render valid that which was initially void. No defense of laches or estoppel is available to the defendants here for the Government as trustee for the Indian Tribe, is not subject to those defenses. Utah Power and Light Co. v. United States, 243 U. S. 389, 408-9; Cramer v. United States, 261 U. S. 219, 234; United States v. Walker River Irr. Dist., supra, p. 339. "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." United States v. California, 332 U. S. 19, 40. And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This, as pointed out, in United States v. 7,405.3 Acres of Land, 4 cir., 97 F. 2d 417, 422, arises out of the provisions of Title 25, U. S. C. A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of

any title or claim thereto except by treaty or convention.[29]

It is thus apparent that we are confronted with the necessity of passing upon the question whether the applicable statutes above quoted, by force of their own terms alone, and unaided by any established practice, or administrative ruling, regulation or interpretation from which acquiesence or implied approval by Congress might be implied, granted the Secretary power to make this agreement. The outcome of this suit is dependent upon our answer to that question.

The Government's contention is that the Secretary had no power to agree to hand over to others 75 percent of the waters actually reserved for the use of the Indians, in the absence of specific statutory authority so to do. There are cases which seem to point in that direction. Speaking of lands reserved by treaty for use of an Indian tribe, in Sioux Tribe v. U. S., 316 U. S. 317, 326, the Court said: "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to congressional delegation of its authority." It has been said that the Secretary's power to dispose

[29]So far as the Ahtanum Irrigation District is concerned, the considerations which would ordinarily induce a court to be sympathetic to a plea of laches would not have full force here. While the record shows that in 1907, counsel for plaintiff Munn offered to dismiss that suit if the United States Attorney would file a bill on behalf of the United States, yet on later occasions when the filing of such a suit was proposed some of the Washington Senators were repeatedly induced by the District to intervene with the Department of Justice to urge that no suit be brought to adjudicate the water rights. Delay was not chargeable solely to the Government officials.

of public lands must be found in specific, not in general legislation relating to public lands as a whole. Hynes v. Grimes Packing Co., 337 U. S. 86, 109. A similarly strict view with respect to the Secretary's power to deal with the property rights of individual Indians has been expressed.[21]

Neither of the sections of the quoted statutes relating to the powers of the Secretary makes any reference to agreements with respect to division of waters of streams bordering Indian reservations as between the Indians and the white settlers. The sections do in general language confer upon the Secretary powers of supervision and of management. R.S. 441 charges the Secretary with the supervision of public business relating to Indians, and R.S. 463 states that the Commissioner of Indian Affairs under the Secretary's direction shall "have the management of all Indian affairs, and of all matters arising out of Indian relations."

It is fair to say that in conferring these powers upon the Secretary of the Interior Congress must have had it in mind that a part of the Secretary's task of supervision and of management of Indian affairs would necessarily deal with certain relations between the Indians on the one hand and their white neighbors on the other. The management of any parcel of land necessarily involves some degree of

[21] "Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory." Cramer v. United States, 261 U. S. 219, 234. Cf. Arenas v. United States, 322 U. S. 419.

occasional adjustment of the rights of the owner in relation to and concerning adjoining landowners; arrangements for the location and erection of boundary fences, and repair and maintenance of those fences are illustrations of this. More specifically we have here the case of a stream which formed the boundary between the Indian reservation and the outside public lands, and which public lands were open to entry by white settlers. The rights of the white settlers to the use of the waters were subordinate to the rights of the Indians, but they were not nonexistent. Until the Indians were able to make use of the waters there was no legal obstacle to the use of those waters by the white settlers. And after the Indian irrigation works were completed, there would still be the right of the non-Indian appropriators to make use of any surplus available within the stream. Where the waters of a stream are subject to use by different landowners, the very use itself involves some accommodation between the parties. It is common knowledge that, particularly in the early days, many streams in the West were used by appropriators or by riparian owners long before the stream rights had been adjudicated, and prior to the establishment of any machinery for the appointment of water masters. That sort of thing involves a measure of dealing between water users. Authority to manage property would normally comprehend dealings of this character.

At the time the 1908 agreement was made, disputes had begun to appear as to the proper division

and distribution of the waters of Ahtanum Creek. Of course it was then open to the United States, although not to the white landowners, to start court proceedings designed to adjudicate the rights of the litigants. It is the view of this court that it could not have been within the contemplation of Congress that the Secretary, vested as he was with the general power of supervision and management of Indian affairs, and of matters arising out of Indian relations, could not make a peaceful arrangement for a practical mode of use of the waters of this stream. As early as 1833, the Supreme Court said in United States v. Macdaniel, 7 Pet. 1, 13-14:

> "A practical knowledge of the action of any one of the great departments of the government, must convince every person, that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow, that he must show statutory provision for everything he does. No government could be administered on such principle. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government."

This principle has frequently been expressed in relation to the acts of the Secretary of Interior or the

Commissioner of Indian Affairs. Thus in Rainbow v. Young, 8 cir., 161 F. 835, 838, the court speaking through Circuit Judge Van Devanter, after citing United States v. Macdaniel, supra, said:

> "In our opinion the very general language of the statutes makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, * * * to manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage. And, while there is no specific provision relating to the exclusion of collectors from Indian Agencies at times when payments are being made to the Indians, it does not follow that the commissioner is without authority to exclude them. * * *"[22]

If, as we believe, it was appropriate and within the general powers granted, for the Secretary of the Interior to enter into a working arrangement as to how the waters of Ahtanum Creek were to be handled and distributed, between the Indians on the one hand, and the white settlers on the other, the question arises whether the agreement made for this purpose be-

[22] "We do not forget that historically and traditionally the Secretary of the Interior has been selected as the executive arm of the Government to execute the declared Congressional policy with the Indians. As such, he and his subordinates have the responsibility of discharging the obligation of the Government to its Indian wards, and in that respect, he is given wide discretionary powers to deal with the individual Indians who are dependent upon the Government for tutelage and protection * * *. In the discharge of these duties, he acts as supervisor, agent, guardian, and trustee of the Indians and his property, whether in the nature of lands or restricted funds." United States v. Anglin & Stevenson, 145 F. 2d 622, 628, 10th Cir., c.d. 324 U. S. 844.

comes void and must be said to be beyond the powers of the Secretary if the arrangement made turns out to be an improvident one so far as the Indians are concerned.

As we have said, the implied reservation of the waters of this stream extended to so much thereof as was required to provide for the reasonable needs of the Indians, not merely as those needs existed in 1908, but as they would be measured in 1915, when the Indian ditch system had been completed. If we assume that this 1915 need extended to substantially all of the waters of Ahtanum Creek, then the question is whether, conceding that the Secretary had the power to make an agreement for some workable division, can it be said that he had the power to agree to give to the white settlers 75 percent of that which the Indians might need in 1915 and subsequent years?

The record here makes it plain that the only person who gave the proposed agreement any study was Engineer Code. The agreement was drawn and signed, not only without consulting the Indians, but without legal advice. His reference to the "recent Montana decisions" (see footnote 11, supra), shows that he knew of the Winters case. Whether he knew that the Supreme Court had affirmed the case on January 6 preceding execution of the agreement, does not appear. It seems likely that the force and broad reach of that decision was not realized by Mr. Code or any one else in the Interior Department at that date. (See footnote 11a, supra.)

With an opportunity to study the history of the Winters rule, as it has stood now for nearly 50 years, we can readily perceive that the Secretary of the Interior, in acting as he did, improvidently bargained away extremely valuable rights belonging to the Indians. Perhaps the feature of the whole matter most worthy of criticism is the apparent failure of the Secretary, before approving such an arrangement, to obtain legal advice either from the Solicitor or from the Department of Justice, as to the validity or the advisability of the proposed agreement. Viewing this contract as an improvident disposal of three-fourths of that which justly belonged to the Indians, it cannot be said to be out of character with the sort of thing which Congress and the Department of the Interior has been doing throughout the sad history of the Government's dealings with the Indians and the Indian tribes. That history largely supports the statement: "From the very beginnings of this nation, the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped, but how best to transfer Indian lands and resources to non-Indians.[23]

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[23] Quotation is from an article on "The Raid on the Reservations" by Dorothy Van de Mark, Harper's Magazine, March, 1956, (Vol. 212, No. 1270). The author sketches the history of our dealings with the Indians, illustrating with references to such examples as the Indian Removal Act (4 Stat. 411), the successive removals of the Cherokees from lands coveted by the white man, and what happened to the reservations under the General Allotment Act of 1887. Another illustration of this same pattern of giving the Indian the short end of the stick is found in the way in which Indian timber is sold for less than market prices, recently commented upon in Squier v. Capoeman, 351 U. S. 1, 4, (footnote 7).

Because it has long been the law that there are few rights granted by treaty to Indians which Congress is obliged to respect,

The numerous sanctimonious expressions to be found in the acts of Congress, the statements of public officials,[24] and the opinions of courts respecting "the generous and protective spirit which the United States properly feels toward its Indian wards," Oklahoma Tax Comm'n. v. United States, 319 U. S. 598, 607, and the "high standards for fair dealing required of the United States in controlling Indian affairs," United States v. Tillamooks, 329 U. S. 40, 47, are but demonstrations of a gross national hypocrisy.

But we are constrained to hold that since some arrangement for the apportionment of the Ahtanum

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Lone Wolf v. Hitchcock, 187 U. S. 553, the general Allotment Act of February 8, 1887, 25 U. S. C. A. 331, was not open to challenge in the courts, and hence the Indians were obliged to accept allotments so small that livestock farming was impractical and the Indians often reduced to leasing the allotments to non-Indians. The so-called surplus unallotted lands were thrown open to white settlers and sold at nominal prices. (See for example, 33 Stat. 302, relating to the Flathead Reservation.) When a particular allotment happened to be valuable, the Secretary refused to convey it. Arenas v. United States, supra. The allotments originally required to be held in trust were in a multitude of cases caused to be patented in fee to the Indians who proceeded to sell or mortgage them and thus lose them to the white owners, a process which goes forward to this day. (For instance see Laws of 84th Cong., 2nd Sess., Chap. 107, Public Law 450, approved March 29, 1956; Public Law 539 of the same Congress, Chap. 326, approved May 28, 1956.) Sometimes the courts have been able to block some of the more flagrant consequences of this practice. See Glacier County, Mont. v. United States, 9 Cir., 99 F. 2d 733; Ward v. Love County, 253 U. S. 17.

[24] Governor Stevens to the Yakimas, May 30, 1855: "The Great Father has learned much of you * * *. I went back to the Great Father last year to say that you had been good, you had been kind, he must do something for you * * *. The Great Father said I want them to have more and larger farms; I told him you had cattle and horses; he answered that he wanted your horses and cattle to increase; * * * Why did the Great Father answer in this way? Why did he send my brother and myself here this day, to say this to you? Because you are his children; his red children are as dear to him as his white children * * *."

Section 3, Indian Removal Act, supra: * * * it should and may be lawful for the President solemnly to assure the tribe * * * that the United States will forever secure and guarantee to them * * * the country so exchanged with them * * *."

waters was the sort of thing which the Secretary was authorized to do by the grant of general powers of supervision and management, he therefore had the power to make the 1908 agreement. The Secretary's mistakes, his poor judgment, his overlooking or ignoring of the true measure of the Indians' rights, his lack of bargaining skill or determination may add up to an abuse of his power, but do not negative it, or make his act ultra vires.

The most serious argument against our construction of the statute as granting the Secretary of the Interior the right to make this contract which took away three-fourths of the Indians' water rights, is to be found in the necessary consequences of our holding. In Shoshone Tribe v. United States, 299 U. S. 476, the Commissioner of Indian Affairs in 1878 agreed to permit and permitted intruding members of the Arapahoe tribe to move upon a portion of the Shoshone Indian reservation which by treaty had been reserved for the Shoshone tribe. Thereafter the Commissioner continued to rule and act on the assumption that the occupancy of the Arapahoes, who had been brought in with a show of military force on the part of the Government, was permanent and rightful. Subsequent recognition of the occupancy of the Arapahoes was ratified by act of Congress. It was held that this chain of events amounted to a taking or an appropriation of the rights of the Shoshone tribe as of the 1878 action of the Commissioner. The court said (p. 497): "Power to control and manage the property and affairs of Indians in good

faith for their betterment and welfare may be exercised in many ways and at times even in derogation of the provisions of a treaty. Lone Wolf v. Hitchcock, 187 U. S. 553, 564, 565, 566. The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation * * *; for that "would not be an exercise of guardianship, but an act of confiscation."'" Here, as we have noted, Congress has never ratified the act of the Secretary in giving the Ahtanum waters to the white settlers. Of course, our holding that the Secretary acted within his powers means that we are giving to his conduct in this regard the same characteristics as an "act of confiscation" as that which was found to have been accomplished in Shoshone Tribe v. United States, supra.[23]

It is clear that the action of the district court in dismissing the appellant's suit was error. The suit, like other proceedings designed to procure an adjudication of water rights, was in its purpose and effect one to quiet title to realty. Rickey Land & Cattle Co. v. Miller & Lux, 9 cir., 152 F. 11, 15, affirmed 218 U. S. 258. It presented claims and issues which required the court to determine and adjudicate the extent of the rights of the parties with respect to the waters of the stream; a determination of the

[23] This suit was filed July 2, 1947. The record shows that on July 24, 1951, a few days before the expiration of the time limited in § 12 of the Act of Aug. 13, 1946 (25 U. S. C. A. 70k) the Yakima Tribe filed a claim based on the 1908 agreement, with the Indian Claims Commission.

validity of the 1908 agreement did not call for the trial court's conclusion that the United States had no interest whatever in the Ahtanum waters.

Furthermore, as in the case of other suits to quiet title, the defendants should have been required to appear by answer and set forth their claims of right to the use of the waters of the stream. Reynolds v. Schmidt, 10 cir., 40 F. 2d 238, 240. In general they did not do so.[26] Thus the answer of Ahtanum Irrigation District and of "the above named defendant landowners, water users, lienholders and encumbrancers whose lands lie within the boundary of said district," is wholly uninformative as to who these water users are, what lands they claim to have the right to irrigate, or how they deraign their titles to any water rights. In addition to admitting and denying certain allegations of the complaint, this answer contains only (1), a plea of laches on the part of the Indians; (2), a plea of the statute of limitations as against the owners of Indian lands patented in fee simple; (3), allegations as to the execution and validity of the 1908 agreement; (4), the allegation that the waters in the creek are insufficient to irrigate both sides thereof; and (5), the allegation that the reservation lands could obtain water supplies from other sources in the Indian reservation without excessive cost. The sufficiency of these answers was challenged by the United States in the pretrial statement. Since the cause must be remanded for further pro-

[26] An exception was the answer of the Corporation of the Catholic Bishop.

ceedings in the trial court, and since those proceedings must determine and adjudicate the respective rights of the parties, during which defendants must be required to show and disclose their rights and titles, it is apparent that proper and appropriate answers must be required from all defendants. Although a pretrial order was made, it wholly failed to correct or deal with this insufficiency of the answers.

The opinion of the trial court found fault with the Government's proof of its water rights, saying: "Since the government cannot recover upon a claim of right of the Yakima Indian nation as an entity, but only as the trustee for several individual Indians who hold trust patents respectively, the claim of each respective owner must be specifically set up and proved, and further there must be proof of acts of some defendant or defendants which interfere with the trust owners of particular pieces of property, before the government can require any landowner north of the boundary to plead or prove his claim to ownership of a water right." With this we disagree. By maps and Indian Office records the United States showed the location, point of diversion and capacity of each ditch constructed by Indians, or by the Indian Service, and the description, irrigable area, and location of all reservation lands served by those ditches with water from Ahtanum Creek. Also shown are the rate of progress through the years since the creation of the treaty in getting this water upon these lands. Just which lands are Indian owned, whether

under trust or fee patent, and which are owned by successors of Indian allottees, also was proven. The quantities of water required by these lands was both stipulated and proven. No more was required, for the United States has the right to make distribution of its waters under such rules as it may adopt, as provided by 25 U. S. C. A. 381, (note 16, supra). It is no concern of ours which particular parcels or allotments are served by the Indian Service ditches, so long as adequate proof was made of their aggregate needs.

It is important that we bear in mind just how the defendants here must deraign their water rights. The record indicates, as we have noted, that the bulk of the waters flowing in Ahtanum Creek would be required for the irrigation of the lands on the reservation which were susceptible of service through the Indian irrigation system completed in 1915. The right to the use of that quantity of water was for the reasons previously indicated originally the exclusive property of the United States as trustee for the Indian tribe. No portion of that volume of water or of the right to the use thereof, was open to appropriation or other acquisition under state law by the defendants or their predecessors in interest. United States v. McIntire, 9 cir., 101 F. 2d 650, 653-4; cf. Federal Power Comm'n. v. Oregon, 349 U. S. 435. To the extent that the defendants are to be permitted to have any part of the use of that portion of the flow of the stream, their rights are deraigned from the agreement of 1908. Apart from that agreement,

those defendants would have no right to the use of any of said waters except in strict subordination of the prior and better rights of the United States as trustee for the Indians. Of course, as between themselves, they could acquire priorities under state law in respect to their use of the surplus after the interest of the Indians had been satisfied but in relation to that surplus only.

Again the 1908 agreement was not made between Engineer Code on the one hand and all citizens of the state of Washington on the other. The agreement was made with specified individuals, and since it related to the use of water, certain qualifications must necessarily be treated as implied conditions thereof. It seems plain that if this, as other agreements relating to Indian rights, is to be construed most strongly in favor of the Indians, it must be understood that the right to the use of the 75 percent of the waters must have been limited to the needs as of 1908 of the particular individuals who were parties to the agreement.

In the case of Benton v. Johncox, 17 Wash. 277, 49 P. 495, the Supreme Court of Washington, in a suit between non-Indian users of water of this same Ahtanum Creek, held that the riparian owners of land upon the stream were entitled to an injunction restraining the non-riparian owners from diverting or interfering with the water of the stream; this on the theory that the common law as expounded in Lux v. Haggin, 69 Cal. 255, 10 P. 674, 753, was the law of Washington at the time when the ownership of these

riparian owners was first initiated. But whether the beneficiaries of the 1908 agreement were dealing as riparian proprietors, or were confined to such owners, or whether owners of appropriative rights were included, their interests as of 1908 were necessarily limited to their then needs, and subsequent uses or ownerships could not enlarge their rights under the arrangement for the division of these waters.

We hold that at any time when the needs of those parties to that agreement, as measured in 1908, were such as to require less than the full 75 percent of the waters of the stream, then their rights to the use of the water was correspondingly reduced, and those of the Indians, in like measure, greater. This follows from the proposition that it is a fundamental maxim of the law of waters that an individual's rights, no matter how measured or described, can never exceed his needs. Vineyard Land & Stock Co. v. Twin Falls, etc., Co., 9 cir., 245 F. 9, 22. It follows also from the general principle that an agreement of the character of that executed in 1908, must be construed as reserving to the Indians, who previously owned substantially all of the waters, everything not clearly shown to have been granted.[23] What we have here

[23] The record indicates that there has from the beginning been a dispute as to whether the agreement applied prior to the season of low water, or in times of early high water. The records of flow in the Indian Irrigation Service main canal for the years 1911 through 1929 appear on page 49 of the Hearings mentioned in note 14, supra. They show a full head at the beginning of each season, that in some years the head was never cut to 25 percent, in a few it was so cut for only a few days, while in most years it was cut to 50 percent in midseason. The claims of the parties in respect to this dispute are for adjudication by the trial court in the light of its determination of the needs of the parties and the other circumstances of the case.

referred to are necessarily issues which must be determined by further proceedings in the trial court, and the parties should be required by pleading or pretrial agreements to frame such issues for trial.

Another issue raised by the United States in the pre-trial order was that the defendants in the use of their claimed 75 percent of the waters, were wasteful. Evidence to this effect was offered and received at the trial. It tended to show irrigation water diverted by the defendants permitted to run to waste upon highways, diverted through open channels with no headgates or measuring devices, old river beds and sloughs used in place of ditches, and the like. The court never reached that issue of course for it dismissed the complaint in its entirety. Waste of irrigation water is not to be tolerated and in arriving at a determination of the rights and needs of the defendants, the court must take into consideration the question of wasteful practices alleged to have been carried on by the defendants. In a case of this character an injunction against such waste is an appropriate part of the decree if the facts developed disclose a need for it. Campbell v. Grimes, 62 Kan. 503, 64 P. 62. If waste cannot otherwise be prevented, a court may restrain a party from using any water until his waste is averted. Glaze v. Frost, 44 Ore. 29, 74 P. 336.

Another issue raised by the United States in the pretrial order is that the defendants have sunk numerous wells by which an additional draft has been made upon the available physical supply of water

within the watershed. This is claimed to be to the detriment of the United States.

In the process of making a complete adjudication of the rights of the parties it is appropriate for the court to inquire into the question of compliance by the defendants not only with the implied but with the express requirements of the agreement of May 9, 1908. That agreement contained provisions that the users of water of Ahtanum Creek must divert the same by substantial headgates equipped with suitable control appliances and with measuring devices. It would appear to be elementary that the court must condition diversion of Ahtanum Creek waters claimed under the 1908 agreement upon compliance with both the express and the implied conditions of that agreement.

It is thus noted that the record here lacks both the statements of claim, and the evidence necessary for determination of issues required to be decided for a complete adjudication of the rights of the parties in this stream. For that reason we have no basis for a ruling upon appellee's motion for an injunction, and that application is denied.

The Government has not taken a definite stand in its argument here with respect to the rights of the so-called "Class Three Defendants," namely, the successors in interest of the original allottees to whom patents in fee were issued, describing lands under the Indian Irrigation ditch. The trial court in its finding No. 18 found that these patentees or their successors,

had failed, for a period of more than ten years, to assert any rights to the 75 percent of the waters of the stream and had lost any rights thereto. These defendants claim that as successors to certain original Indian allottees for whom the waters were reserved and for the benefit of whose lands the Indian ditches were constructed, these defendants have acquired a vested interest in and a right to the distribution of the waters diverted by the United States to the same extent as if their lands were still in the possession of the original allottees. That they did originally acquire such a right through purchase of allotments seems clear from United States v. Powers, 305 U. S. 527. That case holds that white transferees of such fee patented Indian allotments were equally with individual allottees beneficially entitled to distribution of the waters diverted for the Indian irrigation system.

The question remains whether those of them who had acquired such interest more than ten years prior to the institution of this suit are barred by statute of limitation or laches from now claiming any such participation in the benefits of the Government's irrigation system. We think that the answer is to be found in the fact that in any suit brought by any one or more of these Class Three defendants, against the other defendants here, the trustee holder of the water rights would be a necessary party. Cherry v. Howell, 2 cir., 66 F. 2d 713. And since the trustee, the United States, was not susceptible to suit, and could not be made a party defendant, the rights of those third

party defendants cannot be said to be barred and that they are entitled to participate rateably with the Indian beneficiaries in the use of such waters as may be decreed to the United States in this suit.

The judgment is reversed and the cause is remanded for further proceedings in the court below not inconsistent with this opinion.

CHAMBERS, Circuit Judge, concurring:

I concur. I do think that there may be unintended overtones in what Judge Pope says about the Interior Department, Assistant Secretary of the Interior Pierce and Chief Engineer Code which are a little harsh as to their conduct in 1908. I assume that the two men have departed from this vale and 48 years later they cannot defend themselves. Even though they may have known of the Winters decision, those who have a duty to act today may make mistakes which, in the course of future events, may indicate bad judgment.

If the 1908 agreement today works a great injustice, I think that it is for the Congress to correct the unfairness if such there be by developing other irrigable land for the Indians involved. Therefore, I think it is right that we should uphold the agreement of 1908.

(Endorsed:) Opinion and Concurring Opinion. Filed July 10, 1956. Paul P. O'Brien, Clerk.

APPENDIX A-1

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*, v. AHTANUM IRRIGATION DISTRICT, *et al.*, *Appellees.*	No. 14,714

JUDGMENT

Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

(ENDORSED) Judgment
Filed and entered: July 10, 1956
PAUL P. O'BRIEN, Clerk.

APPENDIX "B"

Opinion of the HONORABLE JAMES ALGER FEE Reported in 124 F. Supp. 818

UNITED STATES

v.

AHTANUM IRRIGATION DISTRICT, et al.

No. 312

U. S. DISTRICT COURT E. D. WASHINGTON S. D.

March 7, 1953. Amended January 18, 1954.

Supplemental Opinion January 18, 1954.

[The text of the opinion begins on page 823, Volume 124, F. Supp. Succeeding pages are indicated in brackets.]

*[823]

* JAMES ALGER FEE, District Judge.

By the Treaty of 1855, the Yakima Indians ceded to the United States all their rights in a larger expanse now included in the State of Washington and reserved a smaller area for their own use. For them the United States became trustee of this land. The north boundary of the reservation ran along Ahtanum Creek, but did not include the stream.① The

① 12 Stat. 951. It is obvious, notwithstanding doctrines of international law relating to treaties of civilized nations and notwithstanding the domestic common law of the states or of England relating to the thread of the stream, which the Indians certainly did not understand, that neither the Indians nor the white negotiators considered the water of any value except for fishing and for the limited domestic and stock uses of that date. The stream was not considered an important asset to the reservation as a whole or to any particular parcel of land at the time. The attempt to read current demand for water into the language of this treaty is to forget the events of a hundred years of history.

bulk of the water there comes from a branch which has its source upon what were then by that cession public lands of the United States. During the ninety-seven years since the treaty, numerous persons, defendants here, have acquired lands north of the reservation by patent from the United States. Both before and after the issuance of patents, these owners and their predecessors made beneficial use of the waters of the Ahtanum upon various of these parcels of land and now possess water rights appurtenant thereto. After 1873, there was considerable water appropriated therefrom by the whites, and some was appropriated for Indian lands. Some few years later, Washington was admitted as a state, 25 Stat. 676, 26 Stat. 1552. After the admission, appropriations continued both north and south of the Ahtanum until more was claimed than flowed therein at low water stage. When governmental agencies finally became impressed with the opportunity of reclamation of western lands, under federal control, this feature led to conflict.

However, in 1908, an agreement was made by government agents and representatives of white owners dividing the water between the reservation and the lands beyond.② Still later, at the suggestion of the government, the rights of the users upon lands off the reservation were fully adjudicated by the state

② This agreement, dated May 9, 1908, and signed by W. H. Code, Chief Engineer of Irrigation, Indian Bureau, approved June 30, 1908, by Frank Pierce, First Assistant Secretary of the Interior, and by representatives of the users of water situated north of the boundary, was recorded in the office of the Auditor of Yakima County, Washington, in Vol. 72 of Deeds on page 35.

courts. The Indian lands involved had been allotted in severalty and were held individually by trust patent, and the Indian nation, as such, ceased to have

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rights therein. A great number of these *allotments have been patented in fee and are now owned by whites. Water is furnished to such lands by a ditch originally constructed to carry the share of the waters of the Ahtanum set aside for the Indians by the agreement above referred to. In 1947, the government brought this proceeding to obtain the entire flow of the Ahtanum for the Indians. The whites who claim waters north of the boundary are made defendants, as well as the successors of the Indian allottees on the reservation. The claim of the government set up by the complaint is that by the treaty there was reserved for the Yakima Indian nation the right to all the water of the stream for use upon lands included in the reservation.

When the United States, by the Act of July 26, 1866, 14 Stat. 251, and subsequent legislation, freed the waters flowing unappropriated over public lands in order to allow ownership to be acquired therein by beneficial use, the Territorial Legislature, differentiating the conditions prevailing then in Yakima County, proclaimed that the custom of appropriation would be the source of the title to water rights in the area thereafter.[3] By executive and congressional action, based upon the consent of the people

[3] Session Laws 1873, p. 520.

in the area, the State of Washington was thereafter admitted to the Union. Following the precedent set by the territorial lawmakers, the State has adopted, by legislation of its people, by acts of its legislature and by decisions of its courts, and has promulgated the law within its boundaries. In judicial proceedings brought regularly in its courts, the State has continuously exercised jurisdiction over waters so appropriated in Yakima County, where the reservation and the other lands lie,[4] with the exception of the water allocated to the Indians by the agreement of 1908.

The State, with the consent of all concerned, has appeared as intervenor in this proceeding to protect its rights and prerogatives as the local sovereign and as *parens patriae* in behalf of the individual patentees north of the boundary, who are its citizens and who claim property rights under its laws and under the decrees of its courts.

This case then, at the outset, presents a highly important problem as to the authority of the federal government over property rights granted by it to individuals within the confines of a state admitted upon equal footing with the thirteen original states. As a preliminary to a determination of these questions, it must be discovered how far the claims of the United States impinge upon the sovereignty of the State of Washington, to which was reserved "the powers not delegated to the United States by the

[4] C. Horowitz, Riparian and appropriation rights to the use of water in Washington, 7 Wash. L. Rev. 197.

Constitution, nor prohibited" by the fundamental law "to the States respectively."⑤

The division of powers between the central government and the states is fundamental and is firmly established by the Constitution. The authority of the federal government is limited by the words of that document and is by definition either express or implied by necessity from the fundamental text. But in time of war, in the interest of self-preservation, these guaranties may necessarily be eroded in the rush of events. Nevertheless, it is essential to preserve the balance of local and central governments thus established. It is as much the duty of this Court to preserve states' rights as to confirm in the federal government the necessary authority in an existing emergency.

In the expanse of water law, the rights of each state to control its domestic economy have been expressly recognized. The property interests of individuals established under the theory of water rights current by the interpretation of the particular state

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have been *treated as vested rights. At the culmination of a series of cases which pointed the way, the Supreme Court of the United States, in California-Oregon Power Co. v. Beaver-Portland Cement Company, 295 U. S. 142, 55 S. Ct. 725, 79 L. Ed. 1356, affirmed a decision made by the writer of this opinion in the federal District Court for Oregon, 9

⑤ Amendment X, Constitution of the United States.

Cir., 73 F. (2d) 555, and gave final confirmation of the doctrine that the individual state, by legislation and decision, has absolute power to lay down its own peculiar rule of property rights in waters within its boundaries. These rights of the state, the United States recognized when the State of Washington was admitted, and no reservation was made of the rights to water or control thereof, notwithstanding thirty years had then passed since the proclamation of the treaty. There is then no residual power of the federal government to reclaim or recapture water rights which it has granted to individuals and which the State has recognized since its admission to the Union. It is conceded in this case that there are no paramount rights of the government in the sense that exercise of uncontrolled sovereign power is involved.

But, more important still, the act of admission was a grant of jurisdiction. The gift of the power to hear and decide, bestowed by the sovereign people of this country through their representatives in Congress and the executive department, must be weighed in the light of precedents set up in the dusk of Anglo-Saxon law. But we need not evoke dim memories of grants of jurisdiction such as soc and sac, infangthief and utfangthief, in order to decide this problem. Questions of jurisdiction mark the boundaries of power between sovereignties. If the courts fail to uphold the reservation of power by the Tenth Amendment—the rights of the states against federal administrative aggression—the essential structure of our balanced authorities will be destroyed.

With the act of admission, there was ceded to the State of Washington jurisdiction to adjudicate the rights of persons as to property within its boundaries.[6] The federal courts for this purpose are courts of the state in which they sit. Once a property right in a res has been adjudicated under this grant of jurisdiction, the decree is binding upon all the world, including the government.[7]

On this primary branch of the controversy, therefore, the Court holds that the State of Washington has had, since its admission, sovereign power to promulgate by legislation and decisions of its courts a rule of waters for property within its boundaries. The United States had no sovereign powers to change or amend such a law of waters. While the United States had power upon its own lands or lands held in trust to make rules which were different from those which had force in the rest of the state, the government had no power to impose such rules upon property outside the reservation. The municipal law of the state was binding not only upon all the other lands and waters of the area outside the reservation, but specifically upon all patented lands and owners thereof within its limits.[8]

But, if we lay aside these pretentions of continuing sovereignty upon the part of the federal govern-

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[6] Pollard v. Hagen, 3 How. 212, 44 U. S. 212, 11 L. Ed. 565.

[7] Erie Railroad Co. v. Thompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

[8] The local law will govern the interpretation of patents. Hardin v. Jordan, 140 U. S. 371, 11 S. Ct. 808, 35 L. Ed. 428; Whitaker v. McBride, 197 U. S 510, 25 S. Ct. 530, 49 L. Ed. 857. Compare Sturr v. Beck, 133 U. S. 541, 10 S. Ct. 350, 33 L. Ed. 761.

ment, there still remain serious questions of the property rights in realty or in water now used outside the limits of the reservation. It should then be considered whether the government, upon its own behalf, has pleaded rights to real property or rights in water and has proven these in strict accordance

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with the substantive law as *promulgated by the state by the evidence adduced at trial.

Even in the field of property rights, the feeling of the paramount sovereignty of the central power makes itself prominent.[9] During the last few years, as a result of the drive to acquire paramount rights, there has been apparent the theory of the policy-making agents that the government has the power to re-examine all grants, no matter how ancient or how well recognized by contemporary legislation and construction of nearly a century, as if the central government were still, as it once was, landowner and sovereign of all of the rights in the area covered by the western states.

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[9] An attempt to take back vested interests in lands already patented by the United States without adjudication was prevented by the United States Supreme Court in United States v. Oregon, 295 U. S. 1, 55 S. Ct. 610, 79 L. Ed. 1267, in the first instance. In subsequent proceedings, the persistent effort to expropriate such interests in realty by executive order was finally defeated by the decisions in United States v. Otley, D. C., 34 F. Supp. 182, affirmed United States v. Otley, 9 Cir., 127 F. 2d 988.

The attempt to write a new type of land title by condemnation proceedings was frustrated in United States v. Bauman, D. C., 56 F. Supp. 109; United States v. 9.94 Acres of Land, D. C., 51 F. Supp. 478. See United States v. 16.747 Acres of Land, D. C., 50 F. Supp. 389.

Further, the attempt to escape payment for actual property interests taken was prevented in United States v. Aho, D. C., 68 F. Supp. 358, and United States v. Florea, D. C., 68 F. Supp. 367.

The situation has two cardinal points: first the adjective or procedural; second, the substantive law. On the procedural side then, it has become the fashion for the policy-making lawyers of the government to direct the filing of complaints against individuals, which do not permit the examination of the rights of the government, but which burden the private defendant with the necessity of disproving every possible aspect of any putative claim that ingenuity may subsequently suggest. It was nothing new in this case, therefore, that a complaint was filed which stated no cause of action and apparently suggested some right over and above the rights which ordinary landowners for whom the government is trustee would have. It is characteristic of the attempt to retake for the benefit of the central power rights which long ago passed into private ownership.

Since the complaint did not define the rights of the individual wards of which the government was acting as trustee, the motion to dismiss might well have been sustained.[10] The loose rules of pleading, however, give full scope for anyone attempting to

[10] Under the state court rules, a complaint in an action to quiet title to a water right or to enjoin a violation thereof should distinctly allege (1) ownership and possession of the right by plaintiff, (2) invasion of and injury to the right by defendant, and (3) call upon defendant to set up any adverse interest defendant may have. Spring Hill Irrigation Co. v. Lake Irrigation Co., 42 Wash. 379, 85 P. 6; Miller v. Lake Irrigation Co., 27 Wash. 447, 67 P. 996; Simpson v. Harrah, 54 Or. 448, 103 P. 58, 1007; Kinney on Irrigation and Water Rights (1912), § 1547.

In an action to quiet title to a water right, the complaint should show that the plaintiff owns or possesses any subsisting interest in, or right to, the exact quantity of water or the use thereof. See Inyo Consolidated Water Co. v. Jess, 161 Cal. 516, 119 P. 934, 935.

prevail by use of the paramount position of the sovereign.[11] Therefore, the questions of law were reserved for trial and pre-trial conferences were held. These devices, which are so eminently successful with private litigants, failed completely to obtain definition of the government position from these attorneys, acting on direction from the national capital. The result is that the fundamental theory of the government lawyers has never been outlined in the pre-trial order or elsewhere. Instead, it was argued

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with tremendous insistence that each individual landowner must affirmatively allege *and prove by a preponderance of the evidence has title to the water right of which he is in possession by long user and also the beneficial use to which he is now placing the water and, more especially, the absence of waste.

Before any discussion of the proof, reference must be made to the pre-trial order drawn by the lawyers but signed by the judge. There were no issues of fact or law to particularize the claims of the government. An attempt to try issues which have not been outlined by either pleadings or pre-trial order is not only futile, but it is unjust. Any issue not so formulated cannot be tried because the parties do not know against what to defend. It is not in the case. The provisions of the Civil Rules[12] that any issue upon which evidence has been intro-

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[11] See Wiel, Water Rights in the Western States (1911), § 636.
[12] Rule 15(b), Federal Rules of Civil Procedure, 28 U. S. C. A.

duced without objection may be decided in the trial court or on appeal is invalid if it include such an issue. Unless the cause of action and defense be somewhere delineated before judgment, to the knowledge of the parties, due process of law has not been accorded and the trial is patently unfair.

This Court refuses to try any such issue.

The Court therefore tries the one issue of whether the government has proven that it is trustee for the Yakima Indian nation of the entire flow of the Ahtanum reserved by the Treaty of 1855 and therefore has the right to an injunction against anyone using any of the flow.[13]

The government had the burden of establishing either that the Indian wards had had possession of the water right and had been ousted recently by the defendants or that these wards had title thereto and, as a result, the right to immediate possession.[14]

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[13] The party alleging the existence of a water right has the burden of proof and must prove it unequivocally. Wiel, Water Rights in the Western States (1911), § 636; United States v. Humboldt Lovelock Irrigation Light & Power Co., 9 Cir. 97 F. 2d 38, 42.

[14] All the authorities are in accord that, in an action for an injunction against interference with, or to quiet title to, water rights, the burden is on the plaintiff to establish his ownership of the right in question. Miller v. Lake Irrigation Co., 27 Wash. 447, 67 P. 996.

In Spring Hill Irrigation Co. v. Lake Irrigation Co., 42 Wash. 379, 85 P. 6, a complaint alleged ownership in fee simple and possession of the first right to divert water. The Court held, 85 P. at page 7: "* * * it alleged a good title to water rights, and it challenged the defendants to set up any claims they had against such rights."

"* * * where it appears or was admitted that the plaintiff was the holder of the record legal title and entitled to the possession, it then devolved upon the defendants to avoid that title * * *." White v. McSorley, 47 Wash. 18, 91 P. 243, 244.

"If the plaintiff claims a superior right by appropriation, the complaint must set forth, with sufficient clearness and fullness, the fact of appropriation, the purpose for which the appropriation was made, and the amount of water necessary to effect such purpose." Black's Pomeroy on Water Rights (1893), § 73, p. 130.

An allegation that plaintiff had a right to all the water in the creek during the dry season has been held too indefinite for specific relief. Porter v. Pettengill, 57 Or. 247, 110 P. 393. See also Long on Irrigation, 2nd Ed., § 269, p. 463.

This principle is firmly settled in land litigation whether at law or in equity.[15] The possession of the flow or usufruct is proven by actual application of a specified quantity of water to a beneficial purpose on a particular piece of land.[16] Water rights, whether riparian or appropriative, constitute real property and are appurtenant to particular pieces of land.[17]

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The proof must have shown, in *order to prevail or even require answer other than a general denial, that the United States appeared as trustee of the naked legal title for certain Indian wards, naming them, who owned, respectively, the equitable title to a piece of land, describing it, which land was entitled to a definite quantity of water, in cubic inches under a certain pressure, and such flow had been bene-

[15] Kinney on Irrigation and Water Rights (1912), §§ 1554, 1640; Miller v. Lake Irrigation Co., 27 Wash. 447, 67 P. 996.

[16] "His right as an appropriator depended upon continued use, and, upon abandonment of the use of any part of the water, that part was subject to new appropriation." Smith v. Green, 109 Cal. 228, 41 P. 1022, 1024.

[17] "That water rights for use upon the lands are considered appurtenant to the land, and therefore realty, is declared by our statutes and prior decisions of this court." Madison v. McNeal, 171 Wash. 669, 19 P. 2d 97, 99.

"Water is sometimes held to be real estate, and to pass by grant as the right of a riparian owner to the natural flow of a stream across his lands, a right so inseparably annexed to the soil as to pass with it, not as an easement or appurtenance, but as part and parcel of the land itself." Methow Cattle Co. v. Williams, 64 Wash. 457, 117 P. 239, 241.

ficially used thereon until deprived thereof by act of defendants.[18]

Since this was not a quo warranto proceeding, such as the Crown was wont to bring in England to question franchises and jurisdictional and property rights to the harassment of its subjects, the Court refused to require the defendants affirmatively to assume this burden. Again, in the face of the persistent refusal of the government to define claims against defendants, the Court refused to require these individuals to state an affirmative defense. This procedural claim of the government lawyers was encysted in the pre-trial order. Therefore, the exact claim of neither side is developed.

Although the pre-trial order was thus unsatisfactory, the Court signed and entered it and put the case on trial.

The government did not prove possession of the flow as appurtenant to any piece of real property of a single drop of water of which it claims the

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[18] Plaintiff's right should be stated in inches or gallons. Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 P. 76.

In Simpson v. Harrah, 54 Or. 448, 103 P. 58, at page 59, a suit to enjoin defendant from interfering with the flow of water into plaintiff's irrigation ditch, where plaintiff has claimed no definite quantity of water and the evidence does not disclose the amount to which plaintiff is entitled, the Court held: "Neither the pleadings nor the proof are sufficient to enable us to determine the water rights between plaintiffs and defendant as to the quantity of water either one needs or is entitled to, or as to their relative proportions of the water in the ditch."

In Longmire v. Smith, 26 Wash. 439, 67 P. 246, 58 L. R. A. 308, a suit to enjoin subsequent appropriators from interfering with waters appropriated from him, a plaintiff will not be deprived of his remedy because in the trial court he did not describe a definite measurement of what water he used, and because there was satisfactory proof of the amount required by his lands; but the case will be remanded to the trial court to ascertain the amount of water necessary for plaintiff's lands.

Indian nation is deprived by the patentees of the United States north of the boundary. In fact, there was no proof that the Yakima Indian nation had any rights in this water or interests therein. No communal lands of the Yakima nation are shown to be susceptible to irrigation by any waters of the Ahtanum or to have ever been irrigated thereby.[19] The proof does show that there are various parcels of land, held at some time by allottees, within the confines of the Yakima Indian reservation upon which approximately one-fourth of the flow of the Ahtanum has been beneficially applied since about the year 1900. But there is no complaint as to any interference by anyone with the beneficial enjoyment of this portion of the flow allocated by the agreement above mentioned which has actually been used south of the Ahtanum.

The proof does not show that most of the parcels now in trust for individual Indians are riparian to the stream. On the other hand, most of them are shown not to have any connection with any appropriation or use of water which was made before the state came into the Union. Likewise, the government did not prove that a single cubic foot of water

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*now being used on the north side of the Ahtanum was ever used upon the reservation from 1855 to the present time. This is conclusive that there is no right

[19] One of the maps indicates a minor parcel of tribal land may be susceptible of irrigation, but this is immaterial since it is not shown that water was used thereon before the agreement for division.

to have defendants set up specifications of their rights. The lands on the reservation are now receiving exactly the water which they have received and used since 1908.

There is no proof then of actual possession of this water by anyone south of the stream. If title were established by proof, then the right of possession would follow. The proof of title or the better right to the ownership was attempted to be adduced by the government. But here again, the indistinct allegations of the pleading distort the claims and make these unintelligible.

Only two-thirds of the lands susceptible of irrigation on the reservation are owned by Indian allottees, which the United States is empowered to represent as trustee. The balance have been patented in fee and, as to all property rights both of water and of land, have passed into the jurisdiction of the State of Washington. Usually these parcels were purchased from the original Indian allottee by a white man.

The government joined these owners of former reservation lands as nominal defendants, although they use water allocated to the Indians by the agreement of 1908. But its attorneys have never defined what relief they claimed against these parties. The reason for this is that such a claim is impossible of definition. The United States patented each of these parcels to an Indian in fee, and this title carried with it as an appurtenance the usufruct of that amount of

water which was at that time beneficially used upon that particular piece of real property or the amount to which the land had title by reservation or riparian location and no more. The land and the water right so limited are held by the present owners under the municipal laws of the State of Washington. There is no process whereby the United States can take such water from the present owners except upon payment of just compensation. The government cannot impeach its own conveyance.

These present owners of land and water rights so patented to Indians and released from government ownership were only joined as defendants so that they could make common cause with the government against use of water on non-reservation lands. This they did by what amounts to intervention. The government in the ultimate is placed in the anomalous position of attempting to establish the title to the water for its present owners against other of its citizens who patented lands and used water thereon more than fifty years prior to the conveyance of these reservation lands.

The question of whether the government has proved title to the entire flow of the Ahtanum will now be considered. At the time of the ratification of the treaty, the United States owned all the land and the water and had complete sovereignty over the area when the Indian rights were extinguished. It was not necessary for it to make any appropriation of water for itself or the Indians. All it had to do

was to take the water and use it. All authorities agree upon these propositions. However, when other rights in the area were created in private individuals and in the state by the United States and were guaranteed by it, other problems arose.

"The power of the Government to reserve the waters * * * is not denied, and could not be"[20] when it owned both land and water and was sovereign in the area. Such a reservation would be a part of the title to each piece of land and would bind all successors to any lands on the watershed. But whether there was a reservation is not a question of law but of fact.[21]

If the need were not obvious and in accordance with dictates of necessity, no reservation would be

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implied. The limit *of the implied reservation would generally be the amount of water actually appropriated within a reasonable time. In many cases, the necessary amount has been found exceedingly small. In a leading case,[22] the water of Milk River, with all its tributaries, had flowed through a larger reservation created by an early treaty. In 1888, 25 Stat. 113, by a new treaty, the reservation was diminished and one boundary placed in the center of Milk River for the purpose of allotment in sev-

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[20] Winters v. United States, 207 U. S. 564, 577, 28 S. Ct. 207, 212, 52 L. Ed. 340.

[21] United States v. Walker River Irrigation District, 9 Cir., 104 F. 2d 334.

[22] Winters v. United States, supra.

eralty with the avowed intent to train these Indians to agricultural pursuits. The reservation lands were completely arid. By that time, the absolute necessity of using all available water for the reclamation of desert land was clearly recognized by everyone. It was held that there was a reservation of waters for use on these lands and that these property rights were not destroyed by the admission of Montana to the Union less than a year later. The government, however, moved slowly, but in 1898 was constructing a canal to carry out an appropriation of five thousand cubic feet. An injunction suit was brought by it to restrain persons who were interfering with the flow of this amount of water because they had anticipated the government by making appropriations above the reservation about a year before the canal was commenced. Since the government's application of water to a beneficial purpose was within a reasonable time, it was correctly held that the reservation created a property right superior to those who attempted to claim the water by acts.

In the Walker case,[23] the government sued to prevent interference with the flow of one hundred fifty cubic feet, which was a substantial portion of the flow of a river. It appeared that the reservation had been created by executive order in 1859. Since the country was completely arid, there was immediate use of water to considerable extent by the Indians. In 1887 they were using approximately the same

[23] United States v. Walker River Irrigation District, 9 Cir., 104 F. 2d 334.

quantity of water as at the time the lawsuit was commenced. Upon this basis, the Court awarded them 26.25 cubic feet of water. None of these cases indicates that a reservation of an entire stream could be made for the Indians and then the lost rights recaptured from the whites, who had meantime built an empire by the use of this water upon lands patented to them by the United States for that purpose.

In a most persuasive case, Byers v. Wa-Wa-Ne,[24] the Supreme Court of Oregon construed the Treaty of 1855 with the Umatilla, Cayuses and Walla Walla, which is in almost identical terms with the one with the Yakimas. There the Umatilla River ran through the reservation, which also consisted of semiarid lands. The trial court held, following the Winters case, that there was a water right reserved to each allotment of the reservation, and the Indian passed this to his white successors in a modified form. The Supreme Court reversed. It was held that the treaty had not reserved any rights expressly or by implication, but that by the situation, the parcels abutting on the stream had a right to water for stock, domestic purposes and the irrigation of gardens.[25] The Court upheld an administrative grant

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[24] 86 Or. 617, 169 P. 121.

[25] In a recent case, Seufert Bros. Co. v. Hoptowit, 193 Or. 317, 237 P. 2d 949, at page 953, the Supreme Court of the State of Oregon reaffirmed this view and held: "The implied rights are based directly upon and grow out of the express right reserved. No right may be implied that does not have as its basis some express provision in the treaty itself. The rule is well stated in Byers v. Wa-Wa-Ne, 86 Or. 617, 634, 169 P. 121, 126, as follows: 'Under any rule of construction, if it is proposed to base on the treaty such a right as that contended for by the government, there must be found in the treaty something from which the right can be implied. The treaty may be

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of water rights to outside persons, *which was later confirmed by legislation. This opinion is binding upon the government because the United States attorney represented the Indian wards, and, although the treaty was construed, there was no request for certiorari.[28]

Here, in accordance with previous decisions, we decide that there was a reservation of the use of some water of the Ahtanum. But the reservation was extremely tenuous and narrow. The Court determines from the facts in evidence that there was reserved for such parcels as bordered on the stream the right to have sufficient water flow as would suffice for watering of livestock, domestic uses and the irrigation of gardens, where this was necessary on these bordering lands. A similar right was intended for the lands on the north bank riparian to the stream as well as those which comprised both banks of the

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read in the light of the circumstances under which it was negotiated and ratified. Consideration may be given to the purposes in view and to the situation of the parties, but unless the implication of these water rights is found in the treaty when read in the light of these purposes and circumstances, the rights contended for must be held to be nonexistent.' "

[28] In quite a similar situation, the Supreme Court, speaking through Mr. Justice Van Devanter, has said: "* * * as it appears that for many years the United States has employed and paid a special attorney to represent the Pueblo Indians and look after their interests, our answer is made with the qualification that, if the decree was rendered in a suit begun and prosecuted by the special attorney so employed and paid, we think the United States is as effectually concluded as if it were a party to the suit." United States v. Candelaria, 271 U. S. 432, 444, 46 S. Ct. 561, 564, 70 L. Ed. 1023. Though in a dictum this view has been reiterated recently. "If the United States in fact employs counsel to represent its interests in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results." Drummond v. United States, 324 U. S. 316, 318, 65 S. Ct. 659, 660, 89 L. Ed. 969.

main or north branch of the Ahtanum, through which flows the major portion of the water eventually found in Ahtanum Creek. The circumstances surrounding the signing of the treaty compel this construction.

The text of the treaty itself had no indication of the reservation of the waters or rights to use water. There is no word or expression therein from which any such intention can be deduced. Other rights, such as the right of fishing, which was deemed important are expressly reserved in relation to streams. The body of the Ahtanum does not run through the area carved out by the treaty. In fact, the principal water bearing branch arises and flows for a long distance through property deliberately excluded by the treaty makers and which is at present in white ownership. The boundary of the reservation established by the treaty runs to the south bank of Ahtanum Creek and does not even include the stream.[27] If it had been conceived that water in the amounts claimed today would be needed, it would have been a matter of one stroke of the pen to include the Ahtanum. There was plenty of water upon the Yakima reservation for the needs of the Indians at that date.[28] Owing to subirrigation, which generally

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[27] The Supreme Court in the Winters case, supra, recites the inclusion of part of the stream as a fact cardinal to the decision.

[28] In fact, there is plenty of water now for the vastly expanded needs of the area. But to get this water into the Ahtanum area requires the expenditure of so much money that Congress has so far refused to make the appropriation. But, even if the legislative body is not inclined to make such an appropriation in justice to the Yakima Indians, it is no ground for robbing the white pioneers by rationalization from modern conditions to read property reservations into a Treaty of 1855.

sufficed for the simple needs of the time, it was long before the desirability of the use of copious irrigation was realized.

The doctrine of beneficial use of water developed in the mining districts of California but a few years before even against the landowner, which was usu-

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ally the federal government. The irrigation *of arid lands had not been tried. It was not until 1855 that the doctrine was given an agricultural application even in California. It was not until after 1900 that great pressure developed in regard to the use of water in this area of eastern Washington.

In 1855, the Indians were thought of as a nomadic people, who lived by hunting and fishing and whose chief property consisted in their herds of horses. The whites believed the Indians would be able to support themselves and their animals by the bounteous natural pasture on this soil with its mountains and uplands. While it was the policy of the government to confine them to one area so that they would not bother the whites, there was no policy of allotment, and only the chiefs had individual grounds given them. There was no suspicion as to how water would be used in the vast agricultural development of arid lands as modernly practiced. The government negotiators were conditioned by the idea of riparian rights and had no concept of the use of water on elevated hill slopes miles away or even watersheds away from the banks through which it natur-

ally flowed.[28] As above noted, except in the California mining camps for about six years previously, no one had conceived of transporting water for long distances and using it upon other lands not riparian to the stream.

The contemporaneous and practical construction carries out the idea that neither the white treaty makers nor the Indians intended any further reservations than those enumerated above. But, if it be conceived that there was a reservation of the entire flow, the United States subsequently granted these water rights to those who took by appropriation. The government had plenary power, notwithstanding a grant to the Indians under treaty or a reservation, to convey any property so granted or reserved to others. Lone Wolf v. Hitchcock, 187 U. S. 553, 23 S. Ct. 216, 47 L. Ed. 299. The history of the subsequent legislation, administrative acts and judicial construction can be reconciled with no other theories except these two: either there was no broad original reservation or the government granted water rights to all appropriators without regard to the reservation.

By a series of enactments, the United States permitted persons to acquire property in water as against the United States in accordance with local

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[28] It was subsequently said by the Joint Congressional Commission of 1913: "At the time of this treaty, irrigation was little known, and it does not appear that the subject of water rights bore any important relation to the treaty. It is certain that the value of water rights was not foreseen either by the Indians or the government." 63rd Congress, 2nd Session, Senate Document No. 337, p. 23.

customs and decisions. Early among these statutes was the Act of July 26, 1866.[30]

Theories as to riparian rights were extremely tenacious in the area which became the State of Washington. A long series of decisions of the territorial and state courts make this abundantly clear.[31] It was only after the cruelest necessity forced the change by legislation that the courts began an attenuation of the absolute rights of a riparian owner[32]

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for the benefit of all *the people by attaching an obligation of beneficial use before a property right in water could be claimed.[33] This preconceived notion

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[30] The Act of July 26, 1866, did not create the right to use by prior appropriation of the streams on public land for mining and irrigating purposes, but simply recognized such right which had grown up through the acquiescence of the government and the universal custom of the locality. Where the government allowed the streams on public lands to be diverted for mining and irrigating, and conveyed the land while the streams were so used, the grantee took subject to the changed condition and the rights growing therefrom. Isaacs v. Barber, 10 Wash. 124, 38 P. 871, 30 L. R. A. 665; Geddis v. Parrish, 1 Wash. 587, 21 P. 314; Ellis v. Pomeroy Improvement Co., 1 Wash. 572, 21 P. 27; Tenem Ditch Co. v. Thorp, 1 Wash. 566, 20 P. 588.

[31] See Benton v. Johncox, 17 Wash. 277, 49 P. 495, 39 L. R. A. 107; Brown v. Chase, 125 Wash. 542, 217 P. 23.

[32] In Washington, it is held that judicial notice will be taken of the fact that at least that portion of the state east of the Cascade Mountains was included in the territory where the customary law of miners was in force and the right of appropriating water for agricultural and manufacturing purposes existed although the common law rule of riparian ownership was a part of the law of the state. Isaacs v. Barber, 10 Wash. 124, 38 P. 871, 30 L. R. A. 665; Wiel, Water Rights in the Western States (1911), § 635. See Misc. Publication 418, U. S. Department of Agriculture, 1942, pp. 62-64, 106-107.

[33] The modern tendency is to limit the riparians to actual use. Kinney on Irrigation and Water Rights (1912), § 1975.

In Nesalhouse v. Walker, 45 Wash. 621, 88 P. 1032, at page 1033, the Court said: "* * * riparian owners are entitled to have their natural wants supplied by using so much of the water as is necessary for strictly domestic purposes, and to furnish drink for man and beast, before any can be used for purposes of irrigation; and after their natural wants are supplied, each party is entitled to a reasonable use of the remaining water for irrigation * * *"

See also Brown v. Chase, 125 Wash. 542, 217 P. 23; Proctor v. Sim, 134 Wash. 606, 236 P. 114; State v. American Fruit Growers, Inc., 135 Wash. 156, 237 P. 498; Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 P. 41.

as to water held back the development of the country for many years. However, it is a startling fact that the Legislature of Washington Territory, in 1873, made a special exception of Yakima County, and, following the policy of the Congressional Act of 1866, declared the water of that area open to appropriation.[34] This was the natural result of the passage of the Act in 1866 and the application of the same to local conditions in Yakima County. More astounding still is the fact that, immediately upon the passage of this Act, there were appropriations of the waters of the Ahtanum by the whites on the north side and by the Indians on the south. We need not debate as to whether the title of this water was obtained by reservation in the Treaty of 1855, since these were made within a reasonable time thereafter or were valid by the force of the territorial statute. No one questions the right to use this water so appropriated, even today, if beneficial use is made on the parcel to which the flow became appurtenant.[35]

Although most of the running water of Yakima County touched somewhere on the reservation, the federal government, which had still plenary power, did not repudiate the Act of the territorial legislature. No executive or administrative action was

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[34] Session Laws of 1873, p. 520. See Dickey v. Maddux, 48 Wash. 411, 93 P. 1090.

[35] To settle once for all that use is the nub and not compliance with mere formality, the Court, in Kendall v. Joyce, 48 Wash. 489, 93 P. 1091, at page 1092, held: "* * * a valid appropriation may be made by an actual diversion and use of the water without posting any notice. The one who fails to comply with the statute requiring notice, but actually diverts and uses the water, acquires a good title * * *."

taken to prevent the appropriation of waters either by whites or Indians on or off the reserved lands. In 1877, the Congress passed the Desert Land Act, 43 U.S.C.A. § 321 et seq., which approved all appropriations made in the past and gave specific permission for appropriation of waters on such lands in the future. This enactment, passed only four years later, confirmed the statute of the territorial legislature as to Yakima County and the waters therein.

The later legislative and executive action either adds weight to the finding that in fact there was no further reservation or is proof that the water rights were conveyed away by the government or were abandoned. Let consideration of abandonment take first place. It is an inherent and essential part of the local rule of water rights that the property right fully established will be lost if there be no beneficial use of the water itself within a reasonable time thereafter. Ninety-seven years is not a reasonable time. The thirty years between the treaty and the admission of the state was not a reasonable time to

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*make beneficial application.[36] Even if the water has once been beneficially applied, the water right is lost if there is not continuous beneficial use through

[36] Where a stream divided into three branches, plaintiffs owned land on the two eastern channels and defendants on the western and in 1865 a dam was built diverting all the water into the two eastern channels and in 1895 plaintiffs attempted to change the flow of the water, the Court held: "* * * the acquiescence by plaintiffs and their grantors and all riparian owners below the point of divergence for a period of 30 years has now lost them the right to change the flow from the new into the old channel." Matheson v. Ward, 24 Wash. 407, 64 P. 520, 521.

the years.[37] This is not theory, but one of the hard necessities of the country. Neither the Indian nor the government negotiators then could have intended to make such wholesale use of the water as is now claimed almost a century later.

The Acts of 1866, 1870 and 1877, which were all later than the treaty, evinced an intention to convey to those settlers on the public domain the right to appropriate waters of the Ahtanum which flowed through public lands and the south bank of which alone was on the reservation.[38] These acts were so construed, and the white settlers made appropriations which became appurtenant to their lands. Acting upon the same construction, many Indians, the record shows, likewise made appropriations. The United States patented the lands to the settlers, and likewise by these acts granted the waters. The administrative construction, based upon the failure to object, shows that no one believed the treaty could be so construed, but that the rights to the water must be obtained under the terms of the acts.

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[37] "* * * whatever rights David Lowery had to the land or the water * * * depended upon possession, and ceased with the relinquishment of possession without intent to resume. His right as an appropriator depended upon continued use, and, upon abandonment of the use of any part of the water, that part was subject to new appropriation." Smith v. Green, 109 Cal. 228, 41 P. 1022, 1024.

[38] In an analogous case involving school lands reserved by the United States government, the Court held that the Acts of July 26, 1866, 14 Stat. 251, 253, and July 9, 1870, 16 Stat. 217, 218, "are general in their application and apply to all government lands. * * * it was intended that rights in waters riparian to such reserved lands could be acquired by appropriation in the same manner that such rights were acquired in waters riparian to the public lands generally." State ex rel. Olding v. Stampfly, 69 Wash. 368, 125 P. 148, 150."

These titles were confirmed by the act of admission of the state thirty years after the treaty without express reservation of these water rights and without limitation of the jurisdiction given to the state tribunals.[39] If the United States owned land comprising a complete watershed, it could thereafter still use the water upon any of its lands. But, if there were patentees beneficially using water from the stream, the government was bound in good faith to recognize its own grants both of land and water.

Soon after admission, the State of Washington, by statute, granted to the United States the right to appropriate water for the use of any lands to which the federal government held title.[40] If the latter or its agents had conceived possible the vast development which has followed in the wake of the application, the whole stream of the Ahtanum could have been taken. In accordance with this same theory,

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Congress, in *1902, required that the government should acquire water only in accordance with the laws of the states.[41]

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[39] "The United States relinquished all of its rights to the non-navigable waters of the Yakima river to the territory, and later the state, of Washington. The latter had the right to provide and did provide for the use of those waters and fixed the terms upon which the same might be used." Lawrence v. Southard, 192 Wash. 287, 73 P. 2d 722, 728, 115 A. L. R. 1308. See Barker v. Sunnyside Valley Irrigation District, 37 Wash. 2d 115, 221 P. 2d 827.

[40] Washington Session Laws of 1889-90, § 66, pp. 706, 728.

[41] Act of June 17, 1902, 32 Stat. 388, 390, 43 U. S. C. A. § 391 et seq. Reclamation Act not only recognizes the law of the particular state, but requires Secretary to proceed in conformity, Burley v. United States, 9 Cir., 179 F. 1, 33 L. R. A., N. S., 807. "Certainly, the proviso in the Reclamation Act, 32 Stat. 388, that the Secretary of the Interior shall proceed in conformity with the water laws of the state argues an intention upon the part of Congress to act as did the individual proprietor, and Congress was undoubtedly well advised legally as to its lack of power to do otherwise." Byers v. Wa-Wa-Ne, 86 Or. 617, 169 P. 121, 417 Oregon Briefs 269, 351.

But the administrative construction, upon which great weight is laid in modern times, is actually conclusive. The Indians did not insist upon such rights. Agent after agent held sway in the reservation and did not question the rights of the settlers. The Indians were in tutelage and the government agents did not possess the vision to appropriate the unused portions of the stream until the adventurers had proved what could be done with it. The awakening came about fifty years after the treaty, when the need for water on both sides of the stream became desperate. Thereupon, the Secretary of the Interior made a personal visit to the scene and entered into an agreement giving one-fourth to the Indians and three-fourths to the whites. But it is said the Secretary had no power to grant away property rights of the United States. We are of opinion that he did nothing but recognize the limitations set by practice upon the usage of water on the reservation and confirm the grants to the owners outside. Recognition was thereby given also to the fact that the government and the Indians were permitted by the territorial legislation to appropriate water in Yakima County and that the permission was renewed by the state enactment referred to. The government thereafter built a canal for the purpose of carrying and applying that portion of the flow so allotted to the Indians. In accordance with the terms of the agreement, masters to divide the water have been appointed year after year by the United States and the landowners north of the stream. Subsequently,

the Secretary of the Interior, until the last few years, consistently has recognized these rights,[42] and Secretary Wilbur, as recently as 1930, indicated that he would stand fast by that agreement. With regard to the waters of the Yakima River, which likewise touch the reservation, the United States proceeded to appropriate them under the law of the state in 1905, according to the policy crystalized in the Reclamation Act.[43]

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[42] "They [these suits] are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office." Ickes v. Fox, 300 U. S. 82, 95-97, 57 S. Ct. 412, 417, 81 L. Ed. 525.

[43] Act of June 17, 1902, 32 Stat. 388. It is to be noted that, in dealing with the waters of the Yakima, which stand precisely in the same position as the waters of the Ahtanum, the proper officers of the Department of the Interior have made agreements for the use thereof and no question as to their validity or the right of the representatives of the Indian Service to do so has ever been raised.

On February 19, 1903, the then Superintendent of the Yakima Reservation made a water-right filing for 1,000 cubic feet per second of water from the Yakima river. Non-reservation water users, who had already appropriated almost the entire low-water flow of the river adversely to the reservation, commenced action in the courts of the State of Washington to enjoin the violation of their rights. At this point, the then Secretary of the Interior, E. A. Hitchcock, undertook to compromise all disputed claims to water rights to the Yakima river and allowed 147 cubic feet per second to the reservation as its low flow water right and an aggregate of 650 cubic feet per second to adverse claimants. This amount proved insufficient for the reservation, and, pursuant to the recommendations of the Joint Commission of 1913, Congress, in 1914, provided for a supply of water for about 70,000 acres of land to be supplied from storage reservoirs constructed by the Bureau of Reclamation at no cost to the Indian. The Indian Service subsequently desired to secure a supply of water for the remaining 50,000 acres of irrigable land and entered into an agreement therefor known as the Joint Letter of March 31, 1921, approved by the Secretary of the Interior, with the Bureau of Reclamation. In 1936, the Indian Service desired to secure additional water, and again with the Bureau of Reclamation entered into a new agreement termed the Joint Letter of September 3, 1936, approved by the Secretary of the Interior, which also modified the 1921 agreement. Subsequent to the 1936 agreement, controversies arose between the Bureau and the Indian Service as to the proper interpretation of the 1936 agreement and the 1936 amendment to the 1921 agreement. As a result, there was issued a Joint Letter of Instructions dated June 21, 1938, signed by the Commissioner of Reclamation and the Commissioner of Indian Affairs and addressed to the Superintendent of the Yakima Reclamation Project and to the Project Engineer of the Wapato (Yakima) Indian Irrigation Project.

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*The government agents encouraged the state in 1926 to proceed with the adjudication of the rights to three-fourths of the waters of the stream so long as there was no attempt to question the Indians' right to one-fourth or attempt to adjudicate the remainder. The United States was thus aware of the proceeding. The government was a party to the litigation in the sense that any rights claimed to that portion of the flow must have been asserted by landowners in that proceeding or they would be lost by judgment. The proceeding was one in rem. All parties had the right to assert their claims in the litigation. The state court had the right to adjudicate rights in rem. If the Indian wards or the government had any rights, these could have been asserted. If it had been desired, the proceeding could have been removed to a federal court or the government could have submitted any rights which the wards had to the state tribunal. The reason the government desired to stay clear of this proceeding was that it attempted an all-out defense of its position in relation to the same series of treaties in Oregon and was there defeated.[43] The proceeding of Washington was open and notorious and bound all the world. Rem. Rev. Stat. §§ 7351, 7373; the dissatisfied claimants took an appeal to the Supreme

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[43] Byers v. Wa-Wa-Ne, 86 Or. 617, 169 P. 121, 417 Oregon Briefs 269-501. It is also to be noted that the United States, intervening in a suit in a state court to determine water rights, is bound by the decree. Pioneer Irrigation District v. American Ditch Association, 50 Idaho 732, 1 P. 2d 196.

Court of the State of Washington. In re Ahtanum Creek, 139 Wash. 84, 245 P. 758.

The patentees from the United States then in the reservation did not assert any right to the waters of the Ahtanum beyond the amount which they were then using, and were therefore bound by the decree in that proceeding.[45] Besides, any of them who have permitted the patentees to use the waters of the stream on lands north of the boundary for a period of ten years have lost any right to object under the law of the state.[46]

The government agents have no more power or authority to question this decree in rem than if they had stood by when property to which the government had a claim was awarded by the state courts in interpleader.

In summary, certain conclusions are thus established. Where the United States has relinquished to a state all its rights to non-navigable waters, as was done by the acts above noted and the admission of the state to the Union, the state has the sovereign power to establish the terms upon which such waters may be appropriated. The state recognized the right

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of appropriation in the *arid lands in the eastern portion of the state and set up an elaborate system of administrative finding and judicial determina-

[45] "The volume of the priority awarded a ditch in adjudication proceedings in res adjudicata, and the facts upon which such award is based, cannot be inquired into in a collateral proceeding." Rogers v. Nevada Canal Co., 60 Colo. 59, 151 P. 923, 928.

[46] Rem. Rev. Stat., § 156.

tion.[67] The right to waters of the Ahtanum beneficially used upon patented lands outside the reservation were under the jurisdiction of the state courts and have been fully and conclusively adjudicated under this statutory plan. The proceeding was quasi in rem and related to specific real property. It was local in character. All the world was warned to set up claim to water rights on the stream. By failing to set up a claim, the United States and each of the Indian wards is foreclosed now of any right thereto. In this regard, there is no paramount right of the United States.

The result is that the government has neither proved that it or any of the Indians has been ousted from the possession and use of the flow, nor has it so far proved by a preponderance of evidence that the Indian nation or the individual Indians had title and right of possession to any part of the water now being used by the whites. Although these conclusions are based upon the failure of its lawyers to put the foundations of title of the government in issue and thereby place the defendants upon notice as to the claims against which they would be required to defend, the result, even if final, would not shock the conscience.

For, even if some Indians have been stirred up, not entirely disingenuously, to claim this as another wrong perpetrated by the whites, the rights of the Indians are not really involved. Were the govern-

[67] Rem. Rev. Stat., § 7351ff.

ment to confess its agents had robbed the Yakimas[47] by failure to appropriate water for this land, there is today on the reservation sufficient unused waters to irrigate all the cultivatable land on the Ahtanum. It is true it cannot be shown that the application of this water is economically feasible because of the very high cost of application. But, if an ethical principle of fairness to a conquered and dependent people is involved, money considerations should not be weighed. There should be some morality in the dealings of the government agents. Even if the Indians are justly aggrieved, the government should not pursue a system of Indian-giving with the white owners off the reservation. It is not just to encourage them to spend more than a generation building communities on the basis of this water, and then arbitrarily confiscate it on the basis of a claimed reservation never expressed in words for almost a century.[48]

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[47] The unbounded confidence expressed by the Supreme Court in negotiators for the government has had to be modified. See Justice Douglas dissenting in Northwestern Bands of Shoshone Indians v. United States, 324 U. S. 335, at pages 358, 361-362, 65 S. Ct. 690, 89 L. Ed. 985. The validity of claims for compensation under appropriate circumstances has been fully recognized. United States v. Alcea Band of Tillamooks, 329 U. S. 40, 67 S. Ct. 167, 91 L. Ed. 29.

But no compensation should be given the Indians at the expense of the whites who have purchased land titles from the government and have vested right. Another attempt to do this in which no Indians were involved is found in United States v. Otley, 9 Cir., 127 F. 2d 988.

[48] C. Horowitz, Riparian & Appropriation Rights to the Use of Water in Washington, 7 Wash. L. Rev. 197, 200.

In Broder v. Natoma Water & Mining Co., 101 U. S. 274, 25 L. Ed. 790, it was held that the rights of water appropriators on public domain, which the government by its conduct had recognized and encouraged, would be protected even without congressional legislation. In Isaacs v. Barber, 10 Wash. 124, 38 P. 871, 30 L. R. A. 665, it was held that the Act of July 26, 1866, protected appropriations of water made prior to the Act.

However, if it be determined that there are property rights of various individual Yakima Indians which have been violated by the use of water on lands off the reservation, then the government must put itself in a position where those claims can be defined, defended against and determined with clarity.

In order to have any relief, the government must state as to what lands the United States seeks to

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establish the *use of the entire flow of the Ahtanum as appurtenant. It has never been outlined anywhere as to whether the government intends to parcel out part of the flow to patentees on the reservation, and, if so, in what quantities and to what specific parcels. The attorneys for the government have never stated whether they recognized a distinction between use of part of this water by an Indian upon reservation lands as of a different quality from use by a white man on such lands before or after patent. If the whole flow of the Ahtanum is claimed for the Indians, it is a question as to whether the government recognizes a right in a white successor to an Indian holder of a trust patent who later has been permitted to patent and sell his allotment.

There are some of these individual allotments held by trust patent which border upon the stream. It is a question whether the government claims such parcels have greater, less or equal rights with parcels

far up the steep hillsides.[50] There were some of these parcels upon which appropriations of water were actually and beneficially applied at an early date.[51] There has been no statement as to whether it is contended such parcels have prior rights or only equal rights with parcels which were never irrigated until thirty years thereafter.

Since the government cannot recover upon a claim of right of the Yakima Indian nation as an entity, but only as the trustee for several individual Indians who hold trust patents respectively, the claim of each respective owner must be specifically set up and proved, and further there must be proof of acts of some defendant or defendants which interfere with the trust owners of particular pieces of property, before the government can require any landowner north of the boundary to plead or prove his claim to ownership of a water right.

Further pre-trial conferences and trial, if need be, will be had to accomplish these purposes, if the government requests such action. If no motion is made within a reasonable time, the cause will be dismissed on the merits, since the government has failed to prove a water right reserved for any spe-

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[50] "The mere fact that a tract of land touches a stream at one point does not make such land riparian at other points on the stream, or to the whole of the stream. The riparian right of such land, or the owners thereof, is confined to the points where the land abuts upon the stream." Miller v. Baker, 68 Wash. 19, 122 P. 604, 605.

[51] If there be any claim that there was actually more water appropriated for individual Indians before the Code agreement than the Indians are now receiving, there may be a basis for adjudication. Likewise, it might be possible for certain several tracts held in trust for individual Indians to claim that such tracts are riparian to the stream and as such to claim such rights. Neither the pleading nor the pre-trial order make any such position clear.

cific tract and has failed to prove that any of its wards have been injured by any defendant.

The appropriate record may be presented to the Court by defendants.

SUPPLEMENTAL OPINION

The lawyers for the government demand clarification of the original opinion, pointing to some minor errors which have now been corrected. Throughout this case, these lawyers have been driven by a blind obsession that they could turn the clock back for one hundred years and take away from owners of land patented to them by the United States vested rights appurtenant to each parcel under the municipal law of the state without compensation.①

This Court has consistently held, as was held in the opinion which these lawyers request the Court to explain to them, that water rights appurtenant to such lands could be questioned only by the owner of a particular parcel who alleged and proved affirmatively that he owned a water right prior in time and

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superior in right to that of *the one who has proved to have interfered with his enjoyment of the usufruct. Because such individual claims were neither pleaded, set forth in the pre-trial order, nor proved, the Court held that the patentees of lands outside the reservation on which water was being used were not

① See for similar persistent and unreasoning zeal United States v. Walker River Irr. Dist., D. C. Nev., 11 F. Supp. 158 and particularly United States v. Walker River Irr. Dist., D. C. Nev., 14 F. Supp. 10.

required affirmatively to set up and prove their own claims.

It is axiomatic that, in all litigation over real estate, the plaintiff must recover on the strength of his own title. There are two advantageous aids. If plaintiff has title deeds which vest him with ownership in fee even if he be out of possession, or if, on the other hand, he claims ownership and is in actual possession, he may demand that the adversary allege and prove facts showing adverse claim.

This proceeding is not, as these lawyers seem to believe, of a kind with quo warranto brought by the Crown against these defendants for usurpation on the theory that nil tempus occurit regi and to lie rebutted only by affirmative and independent proof by muniments of a title unquestioned since the mind of man runneth not to the contrary and specifically to the time of the accession of Richard I, of glorious memory, in the year of Our Lord, 1187.

The lawyers for the government did not present a claim for any individual tract of land as trustee of the naked legal title for the equitable owners who are Indians. The body of lands have been allotted in severalty to respective Indian owners. Neither did they allege, claim or prove by written documents title to any specified water right appurtenant to a particular allotment. On the other hand, they did not plead, claim or prove possession by user and benefi-

cial application of any defined water right on any allotment.②

Instead, although the theories have never been exactly defined, these lawyers seem to claim a water right for the entire body of irrigable land on the reservation in this watershed. Although this is disclaimed, such a pretention cannot be supported except as a claim to the entire flow of the Ahtanum for the entire body of reservation land. The basis of this claim is that the makers of the Treaty of 1855, signed by commissioners of the government and certain headmen of the confederated tribes, reserved the waters of the Ahtanum in perpetuity for whatever use might be devised for them in centuries to come. There is no doubt the United States, as owner and sovereign of the whole area, might have so reserved both the land and all the water. The Court held, in the opinion, that the language of the treaty would not bear such a construction. The Court held as a fact that no intention of the treaty makers which envisaged any application of water in quantities could be implied from the circumstances surrounding the creation of the reservation. The Court held that necessity would imply that the parcels touching the river bank be not deprived of water for cooking and

② The government showed, as to each parcel involved herein, the date of allotment, the present owner, the number of acres irrigated and the date of first irrigation, the number of irrigable acres and the ditch or ditches serving each parcel. It set forth a claim of 4.4 acre feet for each irrigable acre. There is nothing in the record to establish the amount of water beneficially used on each parcel or the date of first use of any specified amount. *Specifically, there is nothing in the record to indicate that 4.4 acre feet has ever been used beneficially on any acre within the reservation.*

domestic uses, irrigation of gardens and the watering of stock. No claim, however, was made on this basis for any parcel.

The lawyers for the government say they do not claim the entire flow of the stream, but only 4.4 acre feet per acre per annum for each acre of the entire body of irrigable land—in other words, nearly 22,000 acre feet—which is more water than the entire stream of the Ahtanum flows during any irrigation season. Again, the claimed basis of this afterthought

*[840]

is the Treaty of 1855. The *Court held that specific measurement of water for beneficial use on a parcel of land is a characteristic of the custom of miners developed in the gold fields of California in 1848. This miners' custom was not adapted for use in irrigating agricultural lands until some years thereafter.

The short answer to the proposition that water was appropriated for the use of this entire tract is that the doctrine of appropriation required continuous beneficial application of the corpus of the water upon the particular tract of land. No one pretends to say that any amount over one quarter of the flow of the Ahtanum was ever given application on any portion of this tract during all the hundred years since the treaty.[3] The lawyers for the government did not prove title to and did not prove posses-

[3] In order to bolster its claim, the government in recent years has split up the water to which certain allotments may have been entitled under the law of prior appropriation and has spread it over the entire area of irrigable land within the reservation.

sion of the corpus of the water at any time to give color to their present claim.

The Court held such an appropriation was not contemplated by the treaty makers in 1855. Long after and in 1866, the government first recognized the doctrine of appropriation as available against government rights. It is true that the doctrine of appropriation, after it was developed, protected a party who gave open and public notice of intention to appropriate a specific quantity of water and who within a reasonable time thereafter commenced works sufficient to carry the specified amount of water, and thereafter, also within a reasonable time, actually made beneficial application of the entire amount claimed to the body of land in question.

There was no such intention evinced by the treaty, as the previous opinion points out. There were only sporadic appropriations by individual Indians for the benefit of particular tracts before the state was admitted to the Union. As noted above, there has never been use of the amount of water now claimed on the whole body of the reservation. Neither the United States nor the Indians have built works to this day which are capable of carrying the amount of water now claimed during the irrigation season.

Two events happened near the same time which negative the present claims of the agents. First, in 1889, the State of Washington was admitted to the Union. Second, after 1887, the bulk of the lands of the Yakima Indian Reservation were alloted in

severalty.[4] The Court held, in the opinion, that Washington was admitted on an equal footing with the original thirteen states, and that, while the state must recognize vested rights, her people could enact a municipal law governing the fields of real property and water rights, which would be binding upon all, including the United States. Thereafter, except for rights vested before that date, water rights could not become appurtenant to lands to which even the United States held title unless the local statutes and law were followed. The government, as landowner, whether in its own right or as trustee of a particular tract for an individual Indian allottee, held under the same incidents as an individual owner of property in the state. The Court held that the government agents had neither reserved the entire flow, made an appropriation therefrom, nor evinced an intention of making an appropriation for the entire body of such lands before the state was admitted to the Union.

After the admission of Washington to the Union and the allotment of the lands in severalty, water rights could only become appurtenant to particular parcels thereof.

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*By administrative acts, the government officers and agents negatived the broad claims now put forward. First, in 1908, after the state law was paramount as to water rights, a Secretary of the Interior,

[4] The Act authorizing the allotment of lands within the Yakima Indian Reservation was passed in 1887, 24 Stat. 388. Allotment of such land was substantially completed in 1898.

who was on the ground and was in possession of the facts, approved the allocation of the water of the Ahtanum three-fourths to the landowners off the reservation and one-fourth to the allottees of the reservation. Second, in 1925, the United States Attorney of the District acquiesced in the adjudication of the waters of the Ahtanum among the owners off the reservation provided there was no attempt to settle the priorities between them and the one-fourth of the flow which was being applied within the limits of the reservation.

The Court held such acts have important consequences. They show that there was no intention to make the claim here until a false construction of the Winters case awakened the power-grasping instincts of the bureaucrats. In addition, each was a definite administrative construction of the treaty and rights of the government, the Indians, and those patentees of land outside the reservation, which cannot now be reversed.

The Court believes from the proof in the record that claims could be defined for many of these parcels under the riparian doctrine or under the theory of beneficial appropriation which the Court would enforce. Therefore, a further pre-trial conference was ordered in order to define these claims. The Court recognizes that, by their acts, the agents of the government may have prejudiced the claims of some of these parcels. It may be that riparian lands on the lower portions of the stream have acquiesced so

long in the water being used elsewhere that their rights may not be lost. It is also indicated that the agents may have taken water rights in part from particular parcels which had a prior appropriation and given these to other parcels which had no such rights. This was a violation of local law and a wrong to the individual ward, of which no trustee should have been guilty. The progressive enlargement of the system serving reservation lands after 1908, the addition of new ditches until 1915 at least and the successive new lands watered since 1908 with the same amount of water indicate abandonment by the United States and individual allottees of the right to water which has been beneficially used on other allotments.

The lawyers for the government realized the difficulty with their present position when they came to consider the situation of the patentees of what were formerly reservation lands. Such parcels were no longer in government ownership, but had been patented long after many of the lands outside the reservation. Likewise, some of them may have had early water rights. If these were included as plaintiffs, which was logical, the right enforced by the agent would not be a strictly Indian right. Besides, it would place these late buyers of land parcels in a favored position over the pioneer patentees direct from the government who had been beneficially applying this water for over sixty years in building an empire out of the wilderness. On the other hand, it could be claimed that the water right was strictly an

Indian right which did not pass to a white purchaser. The dilemma has no solution. These subsequent transferees of Indian lands, of course, claimed by right of the original sovereignty of the government. But the lawyers for the government took no position. Therefore, the necessity for further pre-trial conferences is manifest.

If the lawyers for the government persist in the recalcitrant attitude and policy of obstruction which has been adopted all through the case, the complaint will be dismissed for want of prosecution.

APPENDIX C

Treaty With the Yakima, 1855

June 9, 1855.

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, Walla Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakima, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-se, Liaywas, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kalmilt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purpose of this treaty are to be considered as one nation, under the name of "Yakima," with Kamiakum as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

Article I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to-wit:

Commencing at Mount Ranier, thence northerly along the main ridge of the Cascade Mountains to

the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes (119° 10′), which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47°) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokane; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southeasterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "La Lac"; thence southerly to a point on the Yakima River called Toh-mah-luke; thence in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all of which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of

Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

Article 2. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to-wit: Commencing on the Yakima River, at the mouth of the Attahnam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary of the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakima, eight miles below the mouth of the Satass River; and thence up the Yakima River to the place of beginning.

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, except those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and

the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

Article 3. And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest

public highway, is secured to them, as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Article 4. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of Two Hundred Thousand Dollars, in the following manner, that is to say: Sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: For the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years,

six thousand dollars per year; and for the next five years, four thousand dollars per year.

All of which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

Article 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin-shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with

the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon to perform many services of a public character, occupying much of his time, the United States further to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakima Nations, and is recognized as such by them and by the commissioners on the part of the

United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

Article 6. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Article 7. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

Article 8. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before

the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington, or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Article 9. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

Article 10. And provided, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not ex-

ceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and may be subject to the same provisions and restrictions as other Indian reservations.

Article 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,
Governor and Superintendent. (L.S.)
Kamaikun, his x mark (L.S.)
Skloom, his x mark (L.S.)
Owhi, his x mark (L.S.)
Te-cole-kun, his x mark (L.S.)
La-hoom, his x mark (L.S.)
Me-ni-nock, his x mark (L.S.)
Elit-Palmer, his x mark (L.S.)
Wish-och-kmpts, his x mark (L.S.)
Koo-lat-toose, his x mark (L.S.)
Shee-ah-cotte, his x mark (L.S.)
Tuck-quille, his x mark (L.S.)

Ka-loo-as, his x mark (L.S.)
Scha-noo-a, his x mark (L.S.)
Sla-kish, his x mark (L.S.)

Signed and sealed in the presence of—James Doty, secretary of treaties; Mie. Cles. Pandosy, O.M.T.; Wm. C. McKay; W. H. Tappan, sub Indian agent, W. T.; C. Chirouse, O.M.T.; Patrick McKenzie, interpreter; A. D. Pamburn, interpreter; Joel Palmer, superintendent Indian affairs, O. T.; W. D. Biglow; A. D. Pamburn, interpreter.

APPENDIX D

AGREEMENT OF 1908

This Memorandum of Agreement, Made this ninth day of May, 1908, by and between the United States of America, and its assigns, acting in this behalf by W. R. Code, Chief Engineer of Irrigation, Indian Bureau, thereunto duly authorized by the Secretary of the Interior, party of the first part, and W. W. Clidden, et al. users of water from the Ahtanum Creek on lands located north of and adjacent to the Yakima Indian Reservation, in Yakima County, State of Washington, their heirs, administrators, executors and assigns, acting in this behalf by D. E. Lesh, A. D. Eglin, J. J. Wiley, D. B. Greenwalt, William H. Moyer, C. P. Swain, and H. D. Winchester, their duly appointed and constituted attorneys, party of the second part, Witnesseth,

That Whereas the parties hereto claim certain quantities of water in the Ahtanum Creek, County of Yakima, State of Washington, and a right to divert the same for irrigation purposes; and

WHEREAS, a dispute exists as to the extent of the respective rights of the said parties in and to said water,

Now, Therefore, the parties hereto, in order to avoid litigation and in order to limit and define their said respective rights in and to the waters of the said Ahtanum Creek, do mutually covenant and agree as follows:

Article 1. The party of the first part agrees to limit and define its claim to the waters of Ahtanum Creek and its tributaries as twenty-five per cent (25%) of the natural flow of said Creek, and the party of the second part agrees to limit and define its total and aggregate claim to the said waters as seventy-five per cent (75%) of the said natural flow of said stream, each party hereto surrendering and conceding to the other party all rights heretofore claimed in the said waters in excess of the amounts herein named.

Article 2. It is understood and agreed that the Secretary of the Interior may appoint a competent hydrographer to measure the water in said Ahtanum Creek and to determine the amount thereof to which the party of the first part is entitled, at any and all times, by virtue of this agreement.

Article 3. It is further understood and agreed that the waters flowing in said Ahtanum Creek shall be measured at a point on said stream locally known as The Narrows, located about one-fourth of a mile west of the point of intersection of said stream with the west line of Section 14, Township 12 North, Range 16, E.W.M. in said County and State. To the amount thus ascertained to be in said stream at said point shall be added the amounts of water diverted from said Ahtanum Creek, including its North and South Forks, so-called, above said point of measurement. The total amount of water thus ascertained shall be deemed the natural flow of Ahtanum Creek

and the party of the first part shall receive twenty-five per cent (25%) thereof as the amount of said waters to which it is entitled by virtue of this agreement, for use on its lands south of said stream; provided, however, that if it appears at any time that there is an appreciable seepage or return flow to the main channel of said stream below said point of measurement, then such seepage or return flow shall be divided between the parties hereto in the same proportion as herein provided for the division of the natural flow of said stream.

Article 4. It is further understood and agreed that the parties hereto may divert the low water flow, or any part thereof, of said stream, to which they are entitled under the provisions of this agreement, in main canals from any point or points on their respective sides of said stream below the point of measurement hereinbefore located and locally known as The Narrows. If, however, it should be determined in the future by either party hereto, to construct a main canal with its heading at any point between said Narrows and the junction of the north and south channels of said stream, located in Section 13, township 12 North, Range 16 East W.M., the other party hereto shall have the election to join in the construction of that portion of said canal above the junction of the north and south channels aforesaid, which said portion shall be constructed with a capacity sufficient and shall serve to carry the total amount of water diverted by both parties. The cost of the construction of such portion of said canal as may be so jointly

constructed shall be borne by the first and second parties in proportions of one-fourth and three-fourths respectively, and the cost of maintenance and repair of the same shall be borne in like proportions. In case such canal shall be located on the south side of said stream, the party of the first part will furnish a right of way therefor between the points named. If, however, said canal should be located on the north side of said stream, the right of way therefor between the points named, shall be furnished by the party of the second part.

Article 5. It is further understood and agreed that wherever water is diverted from the main channel of Ahtanum Creek by one or more of the water users hereinbefore referred to, or by the party of the first part, a substantial headgate shall be installed and maintained by said water user or water users or by the party of the first part, as the case may be, which headgate shall be of such construction that it can be adjusted and locked by the ditch master hereinafter provided for, and such water user or water users and the said party of the first part shall install and maintain as near as practicable to such headgate a suitable measuring device which shall be a cippoletti weir where practicable.

For the purpose of the division of the waters of the Ahtanum Creek as herein provided for, each of the said parties hereby agrees to appoint on or before the fifteenth day of June of each and every year, a ditch master, whose duty it shall be to so close, regulate, or adjust the headgates of the party so appointing

him, that no more water will be diverted from said Ahtanum Creek by the parties hereto than said parties are respectively entitled to under the provisions of this agreement, and the ditch masters thus appointed are hereby clothed with all necessary authority to do and perform any and all acts necessary to the proper division of said water, and to that end shall receive orders and instructions from the hydrographer appointed by the Secretary of the Interior as to the amounts to which each of the parties hereto is entitled from time to time; provided, however, that nothing contained in this Article shall be construed as settling the rights of the various water users as to their respective rights to the use of water herein conceded to said second party.

Article 6. It is further understood and agreed that the water herein divided between the parties hereto may be used for domestic, power, stock, and irrigation purposes.

Article 7. No Member of or Delegate to Congress, officer, agent or employee of the Government is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, and sections 3739, 3740, 3741, and 3742 of the Revised Statutes of the United States, so far as same may be applicable, are part of this contract.

In Witness Whereof, the parties have hereto signed their names the day and year first above written.

W. W. Code,
Chief Engineer of Irrigation, Indian Bureau,
For and on behalf of the United States of America, Party of the first part.

W. W. Glidden, et al.
D. E. Lesh
A. D. Eglin
J. J. Wiley
D. B. Greenwalt
William H. Moyer
C. F. Swain
H. D. Winchester
Their Attorneys in fact, Party of the Second part.

State of Washington,
County of Yakima—ss.

I, John H. Lynch, a Notary Public in and for said County and State, do hereby certify that personally appeared before me D. E. Lesh, A. D. Eglin, J. J. Wiley, D. B. Greenwalt, William H. Moyer, C. F. Swain, and H. D. Winchester, personally known to me to be the individuals who executed the within and foregoing instrument of writing as Attorneys in fact for and on behalf of W. W. Glidden, et al. The principals names in said instrument, and each for himself and not one for the other, acknowledged to me that he executed the same as the free and voluntary act and deed of the said principals and each of them for the uses and purposes therein mentioned.

In Witness Whereof I have hereunto subscribed my name and affixed my official seal this ninth day of May 1908.

/s/ JOHN H. LYNCH

(Seal)

Notary Public in and for the State of Washington, residing at North Yakima, Washington

Approved this 30th day of June, 1908

FRANK PIERCE,

First Assistant Secretary of the Interior.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 611

AHTANUM IRRIGATION DISTRICT, A CORPORATION, AND THE STATE OF WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court for the Eastern District of Washington, Southern Division (Pet. App. 51–95), are reported at 124 F. Supp. 818. The opinions of the Court of Appeals for the Ninth Circuit (Pet. App. 5–48) are reported at 236 F. 2d 321.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1956 (Pet. App. 49). By order of October 5, 1956, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including December 7, 1956. The petition for a writ

of certiorari was filed on December 5, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, in this action brought by the United States on behalf of the Yakima Indian Tribe to quiet title to certain water rights, erred in remanding the case to the District Court on the ground that petitioners should have been required to set forth the basis of their claims.

2. Whether the Court of Appeals erred in construing the terms of a 1908 agreement, between a group of non-Indian landowners and a Department of Interior official, relating to the use of Ahtanum Creek for irrigation purposes.

3. Whether the Court of Appeals erred in holding that this action was not precluded by a 1925 state court decree to which neither the United States nor any other representative of the Indians was a party.

STATUES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Enabling Act pursuant to which the State of Washington was admitted into the Union (Act of February 22, 1889, 25 Stat. 676, 677) and certain guarantees pertaining to Indians in the Constitution of the State of Washington (Art. XXVI, 2d par.) are set forth in the Appendix, *infra*, pp. 14–16.

STATEMENT

By an 1855 treaty, there was ceded by the Yakima Indian Tribe to the National Government a vast area then situated in the Territory of Washington (R. 16–26). Reserved by the Yakimas were the lands

which they presently inhabit. This reservation is bounded to the north by a small nonnavigable intrastate stream called Ahtanum Creek, a tributary of the Yakima River, which is tributary to the Columbia River (R. 18–19).

Admission of Washington into the Union, approximately thirty-five years subsequent to the 1855 treaty, was conditioned, among other things, upon a disclaimer to "all right and title * * * to all lands lying within * * * owned or held by any Indian or Indian Tribes; * * * Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *." (Enabling Act, Act of February 22, 1889, 25 Stat. 676, 677, Second Paragraph, Appendix, *infra*, p. 15.) An identical proviso is contained in the Constitution of the State of Washington. (1 Revised Code of Washington, Constitution of the State of Washington, Article XXVI, Second Paragraph, *infra*, p. 16.)

Ahtanum Creek and the valley which it serves is the "cradle" of irrigation in the State of Washington (R. 124). As the opinion below states, "irrigation from the Ahtanum had begun in the valley before 1855 in which the Indians had participated" (Pet. App. 10–11). Soon after the turn of this century, conflict broke out between the Indians south of the stream and the non-Indians north of it concerning their respective claims of the meager water supply which it yields in the late summer months. A history of this controversy is set forth in the opinion of the Court of Appeals (Pet. App. 18–22).

In 1908, the Chief Engineer of the Indian Irrigation Service, purporting to act on behalf of the In-

dians, joined with approximately 220 white landowners in executing an instrument (R. 26–32) which provided in pertinent part (R. 27):

> The party of the first part [the United States] agrees to limit and define its claim to the waters of Ahtanum Creek and its tributaries as twenty-five per cent (25%) of the natural flow of said Creek, and the party of the second part [the white landowners] agrees to limit and define its total and aggregate claim to the said waters as seventy-five per cent (75%) of the said natural flow of said stream, each party hereto surrendering and conceding to the other party all rights heretofore claimed in the said waters in excess of the amounts herein named.

The instrument was subsequently approved by the First Assistant Secretary of the Interior (R. 32).

In the same year, 1908, the enlargement of the Ahtanum Indian Irrigation Project to its present size was initiated, and in 1915 was substantially completed (R. 124). There are now approximately 5,000 acres of land in the Yakima Reservation which are served, or can be served, by the Project (Pet. App. 14).[1] A 25% share of the flow of the stream falls far short of the needs of the Indians for the irrigation of these reservation lands (Pet. App. 9, 15).

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[1] Petitioners assert that the agreement of 1908 "became a part of the title to all the Ahtanum tracts" and "has been a part of every water right in the Ahtanum Valley" (Pet. 17). But, as the petition points out (Pet. 15), in 1908 "the nonreservation irrigated acreage north of the Creek was 5500 acres." Since 1908, this acreage has nearly doubled (R. 431, *et seq.*). Thus, of the land for which petitioners claim rights to use of the stream, there are approximately 5,000 acres which were not even irrigated at the time of the 1908 agreement.

In 1925, in the state courts of Washington, the non-Indian users of the stream obtained a decree purporting to adjudicate their relative rights in the 75% of the flow which, it was alleged, the 1908 instrument granted them (Pet. App. 17). *In re Ahtanum Creek*, 139 Wash. 84, 245 Pac. 758. Neither the United States nor any other representative of the Indians was a party to the proceeding (Pet. App. 17).

The present action was brought by the United States as trustee for the Indians to establish and quiet title to the Indians' right to the use of the waters of the stream. The complaint alleged that non-Indian owners of land outside the reservation, who were named as defendants, had unlawfully appropriated the use of the waters (R. 14). The complaint further alleged that the 1908 agreement was "invalid and without force and effect" (R. 15).

After trial, the District Court held that the United States had not proved that it, as trustee or otherwise, had any interest in the waters of the stream, and accordingly dismissed the Government's complaint (R. 164–166). The court concluded: (1) that there was no reservation of any water rights by the 1855 Treaty (R. 164); (2) that in any event the 1908 agreement, allocating 75% of the flow to the white landowners, gave them nothing they did not already own by reason of appropriation (Pet. App. 79); and (3) that the 1925 state court decree barred the United States from claiming any part of the flow allocated by the 1908 agreement to the white landowners (Pet. App. 81; R. 165).

On review, although characterizing the execution of the 1908 agreement as "an 'act of confiscation' [such] as that which was found to have been accomplished in *Shoshone Tribe* v. *United States* [299 U. S. 476]" (Pet. App. 39),[2] the Court of Appeals sustained the validity of the agreement (Pet. App. 35, 38, 39). However, the court held that the 1855 Treaty, under the decision in *Winters* v. *United States*, 207 U. S. 564, plainly reserved rights in the waters of the stream for the Indians, and that the Indians retained these rights except in so far as they had been contracted away in the 1908 instrument (Pet. App. 42). The court also held that the 1925 state court decree could not bind the United States since it was not a party to the proceeding (Pet. App. 17–18). Accordingly, the court concluded that the District Court had erred in dismissing the action without adjudicating the respective rights of the parties to the use of the waters of the stream and without even requiring the defendants to set forth in their answers the basis for their claims to such use (Pet. App. 39–40).

The court stated (Pet. App. 39–41):

> It is clear that the action of the district court in dismissing the appellant's suit was error. The suit, like other proceedings designed to procure an adjudication of water rights, was in its purpose and effect one to quiet title to realty. * * * It presented claims and issues which required the court to determine and adjudicate the extent of the rights of the parties

[2] By order of July 10, 1956, not reflected in the copy of the opinion reproduced by petitioners, the opinion was amended by the substitution of the word "appropriation" for "confiscation".

with respect to the waters of the stream; a determination of the validity of the 1908 agreement did not call for the trial court's conclusion that the United States had no interest whatever in the Ahtanum waters.

Furthermore, as in the case of other suits to quiet title, the defendants should have been required to appear by answer and set forth their claims of right to the use of the waters of the stream. * * * In general they did not do so. * * * The sufficiency of these answers was challenged by the United States in the pretrial statement. Since the cause must be remanded for further proceedings in the trial court, and since those proceedings must determine and adjudicate the respective rights of the parties, during which defendants must be required to show and disclose their rights and titles, it is apparent that proper and appropriate answers must be required from all defendants.

With respect to the proceedings on remand, the court pointed out (Pet. App. 43–45) that the 1908 agreement was not made with "all citizens of the state of Washington" but rather

> was made with specified individuals, and since it related to the use of water, certain qualifications must necessarily be treated as implied conditions thereof. It seems plain that if this, as other agreements relating to Indian rights, is to be construed most strongly in favor of the Indians, it must be understood that the right to the use of the 75 percent of the waters must have been limited to the needs as of 1908 of the particular individuals who were parties to the agreement.

* * * * *

> We hold that at any time when the needs of those parties to that agreement, as measured in 1908, were such as to require less than the full 75 percent of the waters of the stream, then their rights to the use of the water was correspondingly reduced, and those of the Indians in like measure, greater. * * * What we have here referred to are necessarily issues which must be determined by further proceedings in the trial court, and the parties should be required by pleading or pre-trial agreements to frame such issues for trial.

At the present time, as for the past several months, the parties are before the District Court seeking to comply with the directions of the court below. Pursuant to those directions, the District Court ordered the submission of memoranda setting forth the issues to be resolved, and such memoranda were filed by the United States and petitioners on November 15 and December 18, respectively. Answers are to be filed by March 1. We are also advised that a master will probably be appointed by January 15, 1957.

ARGUMENT

1. At the outset, it should be noted that the decision below is non-final in that the Court of Appeals remanded the case to the District Court for an adjudication of the rights of the various parties to the use of the stream (see *supra*, pp. 6–7). While this Court unquestionably has jurisdiction to review the decision, although interlocutory, such jurisdiction will not ordinarily be exercised in the absence of exceptional circumstances (*e. g., United States* v. *General Motors Corp.*, 323 U. S. 373, 374, 377). No such exceptional circumstances are presented here. This is not a case

where the very jurisdiction of the lower courts is challenged (*Land* v. *Dollar,* 330 U. S. 731, 734, n. 2; *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U. S. 682, 685, n. 3). Nor is there a conflict between circuits on any of the issues presented (*United States* v. *General Motors Corp., supra*). Nor is there a showing of any other basis for interlocutory review (cf. *Youngstown Co.* v. *Sawyer,* 343 U. S. 579, 584).

The gist of the petition is that the court below, while holding the 1908 agreement to be valid, erred in construing the terms of the agreement (Pet. 15–17, 21–23). In our view, petitioners' contention is without merit.[3] But, in any event, even apart from its relative narrowness for certiorari purposes, the question of the construction of the agreement is premature at this stage of the litigation. In fact, as the opinion below shows, the Court of Appeals' construction of the agreement is completely independent of its decision reversing the District Court's judgment. The reversal was explicitly based, not on the construction of the agreement by the court below, but rather on its rejection (see *supra,* pp. 6–7) of the trial court's basic holding that the United States had failed to

[3] The Government has in no sense abandoned its position that the 1908 agreement is ineffective to destroy Indian rights in the stream. However, for the reasons set forth in the text (*infra*), the Government believes that this issue is also not yet ripe for review and accordingly did not file a petition for certiorari from the decision below. Of course, in the event that the instant petition were granted, the Government would, in the alternative, seek to sustain the decision on the ground that the 1908 agreement did not validly convey away any rights reserved by the 1855 Treaty.

prove any interest in the stream.[4] The Court of Appeals having determined that the Government had more than satisfied its preliminary burden of proof in this action to quiet title, the conclusion was inescapable that the District Court had erred in failing to require the defendants, at the very least, to appear by answer and set forth the basis of their claims to use of the stream. Thus, even if the opinion below had contained nothing concerning the construction of the agreement, a remand to the District Court would still have been essential.

Seen in this light, the discussion by the court below as to the construction of the agreement merely constituted directions with respect to the proceedings on remand. So far, the court's construction of the agreement has not yet been applied to petitioners. Until it is, and until complex issues of fact and law have been adjudicated in the trial court, the effect of the construction of the agreement cannot be ascer-

[4] The trial court rested this conclusion on three principal grounds: (a) its construction of the 1855 Treaty; (b) the doctrine of appropriation; (c) the 1925 decree. The rejection of each of the three grounds by the court below—and hence the resulting remand—was clearly correct. Petitioners, in fact, have apparently abandoned two of the three grounds in this Court. Their petition makes no mention of the doctrine of appropriation. Cf. *Federal Power Commission* v. *Oregon*, 349 U. S. 435 (decided subsequent to the trial court's decision in the instant case). Similarly, petitioners do not now contend that the 1855 Treaty did not reserve any rights to the stream. Rather, they seek to distinguish *Winters* v. *United States*, 207 U. S. 564, on the ground that no agreement such as the 1908 agreement was there involved; but what transpired in 1908 can have no bearing on the question of what rights were reserved in 1855. With respect to the 1925 decree, see *infra*, pp. 11–13.

tained. In short, the principal questions which petitioners now present are, at this stage, abstract and hypothetical. After completion of the proceedings on remand (now in progress—see *supra,* p. 8), and after review by the court below of the trial court's decision on remand, there will then be ample opportunity for petitioners to again seek certiorari and present the same questions they now seek to have reviewed.

2. Apart from their claim that the court below misconstrued the terms of the 1908 agreement, petitioners resist remand on the ground that the 1925 state court decree determined their rights to 75% of the flow of the stream. They contend that "Any readjudication of water rights vested under state law would * * * result in confiscation of property in violation of the Fifth Amendment" (Pet. 18). Similarly, they contend that the decision below violates the Tenth Amendment because the "decision would require the individual defendants to appear by answer and set forth their claims of title to the waters of the stream" (Pet. 18).

These contentions, although garbed in constitutional phraseology, are merely another way of stating that the court below erred in refusing to hold the 1925 decree binding on the Government (Pet. App. 17–18). The Government, however, was not a party to that proceeding; nor was any other representative of the Indians.[5] While the 1925 decree might be

[5] There is no foundation for petitioners' assertion that the 1925 adjudication was "requested" (Pet. 17–19) by the United States. The only authority cited by petitioners in this regard is a letter,

binding on the white landowners as to their relative interests in the stream, it cannot be determinative of the rights of third parties not before the court, particularly the federally protected rights of the Indians.[6] Their rights, unless validly conveyed by the 1908 agreement, remain intact.[7] As the court below held (Pet. App. 43): "Of course, as between themselves, [petitioners] could acquire priorities under state law in respect to their use of the surplus after the interest of the Indians had been satisfied but in relation to that surplus only." The court's holding is further supported by the express disclaimer in the Constitution of the State of Washington to "all right and title * * * to all lands lying within said limits

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dated January 15, 1919, from the Assistant Commissioner of Indian Affairs to the State Hydraulic Engineer (R. 119–120). This letter asks "that you shall take such steps with respect to the white water users * * * as may be necessary to require them to carry out their part of this agreement * * *." It affords no basis for the inference that the 1925 state court adjudication, initiated over six years subsequent to the letter, was "requested" by the United States. If any doubt remained, it is dispelled by the Commissioner's letter of Sept. 17, 1923, to the State Supervising Engineer (R. 120–122). This letter, written two years prior to the 1925 adjudication, states that the only water subject to such an adjudication was water "over and above the quantity required for Indian purposes" (R. 121) and that the attitude of the Department of Interior toward such an adjudication depended on "whether or not the state officials are willing to concede the Indians' priority to sufficient quantity of water of this stream to take care of their needs" (R. 121; see also R. 122).

[6] And, as petitioners point out (Pet. 14), the United States was not susceptible to suit. See, *e. g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682.

[7] In this connection, it may be noted that petitioners do not contend in this Court that the 1855 Treaty failed to reserve Indian rights to use of the stream. See note 4, *supra*.

owned or held by any Indian or Indian tribes" (Appendix, *infra*, p. 16).

Moreover, the "readjudication" (Pet. 18) which petitioners oppose has yet to take place. For the reasons already stated (*supra*, pp. 10–11), the possibility of any substantial injury to petitioners resulting from the proceedings on remand is wholly speculative at this point.[8] Merely being required "to appear by answer and set forth their claims of title to the waters of the stream" (Pet. 18) certainly does not constitute such an injury. In view of petitioners' heavy reliance on the 1908 agreement, it should hardly be burdensome to show how their rights deraign from that agreement. And, as already pointed out, the trial court's decision will be subject to further appellate review, both in the court below and in this Court. The proceedings on remand, already in progress in the trial court (*supra*, p. 8), should be permitted to proceed to a decision.

CONCLUSION

Accordingly, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

JANUARY 1957.

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[8] Petitioners' other contentions, with respect to wells outside the Yakima Reservation (Pet. 23–24) and the status of so-called Class 3 defendants (Pet. 24–25), are likewise plainly premature in this posture of the case.

APPENDIX

1. The Act of February 22, 1889, 25 Stat. 676–677, provides in pertinent part:

ENABLING ACT

An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the union on an equal footing with the original States, and to make donations of public lands to such States.

* * * * *

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments, for said proposed States, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States, and the people of said States:

* * * * *

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

2. The Constitution of the State of Washington, Article XXVI, Second Paragraph, provides in pertinent part:

ARTICLE XXVI

COMPACT WITH THE UNITED STATES

* * * * *

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: * * *.

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